DOCKET

SUPREME COURT

OF THE UNITED STATES

No. 10-879

Title	Gloria Gail Kurns, Executrix of the Estate of George M. Corson, Deceased, et al., Petitioners v. Railroad Friction Products Corporation, et al.
Docketed	January 6, 2011
Lower Ct.	United States Court of Appeals for the Third Circuit
Case Nos.	(09-1634)
Decision Date	September 9, 2010
Rehearing Denied	October 5, 2010
Questions Presented	

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jan 3 2011	Petition for a writ of certiorari filed. (Response due February 7, 2011)
Jan 31 2011	Order extending time to file response to petition to and including March 9, 2011, for all respondents.
Mar 9 2011	Brief of respondent Railroad Friction Products Corporation in opposition filed.
Mar 9 2011	Brief of respondent Viad Corp in opposition filed.
Mar 23 2011	DISTRIBUTED for Conference of April 15, 2011.
May 17 2011	DISTRIBUTED for Conference of June 2, 2011.
May 17 2011	Supplemental brief of respondent Viad Corp. filed. (Distributed)
May 18 2011	Supplemental brief of respondent Railroad Friction Products Corporation filed. (Distributed)
Jun 6 2011	Petition GRANTED.
Jul 14 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Jul 14 2011	The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 12, 2011.
Jul 14 2011	The time to file respondents' brief on the merits is extended to and including October 3, 2011.
Aug 8 2011	SET FOR ARGUMENT ON Wednesday, November 9, 2011.
Aug 12 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for Viad Corp. and Railroad Friction Products Corp.
Aug 12 2011	Joint appendix filed.
Aug 12 2011	Brief of petitioners Gloria Gail Kurns, Executrix of the Estate of George M. Corson, Deceased, et al. filed.
Aug 17 2011	Record from U.S.C.A. for 3rd Circuit is electronic.

Aug 19 2011	Brief amicus curiae of the United States filed
Aug 19 2011	CIRCULATED
Aug 19 2011	Brief amici curiae of Public Law Scholars filed. (Distributed)
Aug 19 2011	Brief amicus curiae of National Association of Retired and Veteran Railway Employees filed. (Distributed)
Aug 19 2011	Brief amicus curiae of Public Justice, P.C. filed. (Distributed)
Aug 19 2011	Brief amicus curiae of American Association for Justice filed. (Distributed)
Aug 19 2011	Brief amicus curiae of Academy of Rail Labor Attorneys filed. (Distributed)
Aug 22 2011	Record received from U.S.D.C. for Eastern District of Pennsylvania and the Court of Common Plea of Philadelphia. (2 boxes)
Oct 3 2011	Brief of Railroad Friction Products Corporation, et al. filed. (Distributed)
Oct 7 2011	Brief amicus curiae of Association of American Railroads filed. (Distributed)
Oct 7 2011	Brief amicus curiae of DRI - The Voice of the Defense Bar filed.
Oct 7 2011	Brief amicus curiae of Washington Legal Foundation filed. (Distributed)
Oct 7 2011	Brief amicus curiae of Product Liability Advisory Council filed. (Distributed)
Oct 11 2011	Brief amicus curiae of National Association of Manufacturers filed. (Distributed)
Oct 11 2011	Brief amicus curiae of ThyssenKrupp Budd Company filed. (Distributed)
Oct 11 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 11 2011	Brief amicus curiae of Griffin Wheel Company filed. (Distributed)
Oct 11 2011	Brief amicus curiae of Chamber of Commerce of the United States of America filed. (Distributed)
Oct 11 2011	Brief amicus curiae of General Electric Corporation filed. (Distributed)
Oct 11 2011	Brief amicus curiae of John Crane Inc. filed. (Distributed)
Oct 28 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 28 2011	Reply of petitioners Gloria Gail Kurns, Executrix of the Estate of George M. Corson, Deceased, et al. filed. (Distributed)
Nov 9 2011	Argued. For petitioners: David C. Frederick, Washington, D.C., and Sarah E. Harrington, Assitant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Jonathan D. Hacker, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

No. 10-

Supreme Court, U.S.
FILED

RECORD
AND
BRIEFS

10-879

JAN 3- 2011

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, WIDOW IN HER OWN RIGHT

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORPORATION

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD P. MYERS
Counsel of Record
ROBERT. E. PAUL
1608 Walnut St., Suite 500
Philadelphia, PA 19103
(215) 735-9200
rpaul@prmpclaw.com

Attorneys for Petitioners
Gloria Gail Kurns and Freida E. Jung Corson

231822

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

DID CONGRESS INTEND THE FEDERAL RAILROAD SAFETY ACTS TO PREEMPT STATE LAW-BASED TORT LAWSUITS?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Gloria Gail Kurns and Freida E. Jung Corson are individuals and plaintiffs-petitioners in this action. Ms. Kurns is the executrix of the estate of the late George M. Corson. Mrs. Corson is the widow of George M. Corson.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW ...	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	4
STATUTES INVOLVED	4
STATEMENT OF THE CASE	11
A. Form of Action and Procedural History	11
B. Facts Necessary to the Disposition of the Case	13
REASONS FOR GRANTING THE PETITION	15

Table of Contents

Page

CONGRESS DID NOT INTEND THE FEDERAL RAILROAD SAFETY ACTS TO PREEMPT STATE LAW-BASED TORT LAWSUITS 15

A. This Court has consistently allowed railroad workers and non-railroad workers alike to sue the entities subject to the railroad safety acts under state law 15

B. Neither the Safety Appliance Act nor the Boiler Inspection Act contained preemptive language, and subsequent reenactments have evidenced congressional intent not to preempt state regulation 26

C. This Court should abandon implied federal field preemption 36

CONCLUSION 40

TABLE OF APPENDICES

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (ENTERED SEPTEMBER 9, 2010) 1a

APPENDIX B - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED (ENTERED FEBRUARY 3, 2009) 22a

APPENDIX C - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DENYING RECONSIDERATION OF SUMMARY JUDGMENT ORDERS GRANTED IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS (ENTERED SEPTEMBER 11, 2008) 40a

APPENDIX D - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING EN BANC (ENTERED OCTOBER 5, 2010) 42a

TABLE OF CITED AUTHORITIES

Page

CASES

Angell v. Chesapeake & O.R. Co.,
618 F.2d 260 (4th Cir. 1980) 25

Atchison, T. & S.F. R. Co. v. Scarlett,
300 U.S. 471 (1937) 18, 19

Atwell v. John Crane, Inc.,
986 A.2d 888 (Pa.Super. 2010) 3

Boyer v. Atchison T. & S. F. R. Co.,
38 Ill. 2d 31 (1967) 21

Brady v. Terminal R. Ass'n,
303 U.S. 10 (1938) 25

Breisch v. Central R. of N.J.,
312 U.S. 484 (1941) 19

California v. ARC Am. Corp.,
490 U.S. 93 (1989) 38

CSX Transp., Inc. v. Easterwood,
507 U.S. 658 (1993) 30, 33

English v. General Elec. Co.,
496 U.S. 72 (1990) 38

Fairport, P. & E.R. Co. v. Meredith,
292 U.S. 589 (1934) 17, 18

Cited Authorities

Page

Fleming v. Richardson,
24 N.W. 2d 280 (Ia. 1946) 19

Gade v.
National Solid Waste Management Ass'n,
505 U.S. 88 (1992) 38

Gilvary v. Cuyahoga V. R. Co.,
292 U.S. 57 (1934) 17

Kurns v. A. W. Chesterton, Inc.,
2010 U.S. App. LEXIS 18853 (3d Cir. 2010)
aff'g 2009 U.S. Dist. LEXIS 7757 (E.D. Pa.
Feb. 3, 2009) 2, 3, 4

Kurns v. Airco Welders Supply, Inc.,
2008 Phila. Ct. Com. Pl. LEXIS 241 (2008)
..... 1, 2, 11, 12

Law v. GMC,
114 F.3d 908 (9th Cir. 1997) 23, 25, 26

Marshall v. Burlington Northern, Inc.,
720 F.2d 1149 (9th Cir. 1983) 23, 24

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 38

Napier v. Atlantic C. Ry. Co.,
272 U.S. 605 (1926) ..... *passim*

Cited Authorities

Page

Norfolk & W.R. Co. v. Pa. Pub. Util. Com.,
413 A.2d 1037 (Pa. 1980) 2, 21, 22

Powers v. McCullough,
140 N.W. 2d 378 (Ia. 1966) 20

Retail Clerks Int'l Ass'n v. Schermerhorn,
375 U.S. 96 (1963) 38

Shields v. Atlantic C. L. R. Co.,
350 U.S. 318 (1955) 20, 21, 24

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984) 39

Southern R. Co. v. United States,
222 U.S. 20 (1911) 26

Southern R.R. v. OSHRC,
539 F.2d 335 (4th Cir. 1976), *cert. denied*
419 U.S. 999 (1976) 34

Sprietsma v. Mercury Marine,
537 U.S. 51 (2002) 39

Steel v. Burlington Northern, Inc.,
720 F.2d 975 (8th Cir. 1983) 25

Terminal R. Ass'n v.
Brotherhood of R. Trainmen,
318 U.S. 1 (1943) 36

Page

Tipton v. Atchison, T. & S. F. R. Co.,
298 U.S. 141 (1936) 16, 17, 19, 24

Tisneros v. Chicago & N.W. Ry. Co.,
197 F.2d 466 (7th Cir. 1952), *cert. denied*,
344 U.S. 885 (1952) 25

Urie v. Thompson,
337 U.S. 163 (1949) 15, 26

Wyeth v. Levine,
— U.S. —, 129 S. Ct. 1187, 173 L. Ed. 2d 51
(2009) 37, 28, 39

STATUTES

15 U.S.C. § 1334(b) 39

25 U.S.C. § 1254 4

29 U.S.C. § 653 (b)(4) 35

42 U.S.C. § 300aa-22(b)(1) 39

45 U.S.C. § 34 ..... 23, 24

49 U.S.C. § 20105 30

49 U.S.C. § 20106 5

49 U.S.C. § 20106(a) 29

Page

49 U.S.C. § 20106(a)(c) 33

49 U.S.C. § 20106(b) 32

49 U.S.C. § 20301 ..... *passim*

49 U.S.C. § 20302 7

49 U.S.C. § 20302(2) 9

49 U.S.C. § 20302(a)(1)(B) 9

49 U.S.C. § 20302(a)(5)(A) 9

49 U.S.C. § 20302(c) 7, 9

49 U.S.C. § 20302(d)(2) 9

49 U.S.C. § 20302(d)(3) 9

49 U.S.C. § 20303 7

49 U.S.C. §§ 20701 ..... *passim*

49 U.S.C. §§ 20703 ..... *passim*

FEDERAL REGULATIONS

49 C.F.R. § 200-268 34

49 C.F.R. § 221 ..... 34, 35

Page

49 C.F.R. § 224.5 30

LEGISLATIVE MATERIALS

H.R. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104 ..... 26, 27, 28, 29

OPINIONS BELOW

Defendants-Respondents Railroad Friction Products, ("RFPC") and VIAD Corporation ("VIAD"), moved for summary judgment in the Court of Common Pleas of Philadelphia County, First Judicial District of Pennsylvania. RFPC and VIAD argued that there was insufficient evidence of Petitioners' Decedent, George M. Corson's exposure to asbestos from any of Respondents' products to find factual causation. *Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008). VIAD argued that Petitioners' claims were barred by the doctrine of federal preemption. The Philadelphia Court of Common Pleas denied RFPC's and VIAD's motions for summary judgment, but granted the summary judgment motions filed by several other defendants.

On May 13, 2008, following the grants of summary judgment to some defendants and the voluntary dismissal of other defendants, including the first captioned defendant, A.W. Chesterton, Inc., RFPC removed the remainder of the case to the United States District Court for the Eastern District of Pennsylvania. Petitioners asked the District Court to reconsider the state court grants of summary judgment to Defendants Soo Line Railroad, Airco/BOC and Westinghouse Air Brake.[1] District Court Judge James T. Giles denied these

1. A.W. Chesterton was voluntarily dismissed by Petitioners in the state court action on April 25, 2008, prior to removal to the District Court. The only remaining defendants in the state court case before its removal were RFPC and VIAD. *Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008) at *2-3.

(Cont'd)

motions, stating that he lacked jurisdiction over the defendants who had won summary judgment in the state court. (App. C at 40a).

RFPC and VIAD again moved for summary judgment in the District Court[2] claiming that federal law preempted Petitioners' claims. On February 5, 2009, District Court Judge Mitchell S. Goldberg granted these defendants summary judgment. *Kurns v. A. W. Chesterton, Inc.*, 2009 U.S. Dist. LEXIS 7757 (E.D. Pa. Feb. 3, 2009) (App. B at 22a). Petitioners appealed to the United States Court of Appeals for the Third Circuit on March 4, 2009. After briefing and oral argument, the Third Circuit panel affirmed the District Court's orders in an opinion filed on September 9, 2010. *Kurns v. A. W. Chesterton, Inc.*, 2010 U.S. App. LEXIS 18853 (3d Cir.

(Cont'd)

Linde, LLC f/k/a/The BOC Group f/k/a/ Airco Welders Supply, Inc., ("BOC/Airco") was granted summary judgment by the Philadelphia Court of Common Pleas on May 13, 2008. *See Kurns v. Airco Welders Supply, Inc., Id.* The United States District Court for the Eastern District of Pennsylvania denied Petitioners' motion to reconsider the state court grant of summary judgment to Linde/BOC/Airco, stating that it had no jurisdiction over a defendant that was dismissed in the state court action. (*See* Appendix C at 40a).

2. As noted earlier, only VIAD raised the issue of federal preemption in the state court. However, Pa.R.C.P. P. 1041 provides that when one defendant raises an issue that would defeat the claims as to all defendants, it is deemed filed on behalf of all defendants. The state court rejected VIAD's preemption argument based *upon Norfolk & W.R. Co. v. Pa. Pub. Util. Comm'n.*, 413 A.2d 1037 (Pa. 1980). RFPC raised the preemption issue before the District Court in the case herein.

2010). (App. A at 1a). On September 22, 2010, Petitioners moved for a rehearing *en banc*, which was denied on October 5, 2010. (App. D at 42a).

In addition to the opinions in the instant case, Petitioners' counsel have previously responded to two petitions for writs of certiorari in two Pennsylvania state cases in which the Pennsylvania Superior Court affirmed judgments. In both of those cases, the Pennsylvania Supreme Court rejected petitions for appeal. The sole issue on appeal in those cases is federal preemption. In the first of those cases, the Pennsylvania Superior Court published its opinion affirming judgment. *Atwell v. John Crane, Inc.*, 986 A.2d 888 (Pa.Super. 2010). The Petition for Writ of Certiorari is pending in this Court at No. 10-272.[3] In the second case, *Harris v. Griffin Wheel, Inc.*, the Pennsylvania Superior Court did not publish an opinion. The Petition for Writ of Certiorari is pending in this Court at No 10-520 in *Harris*.[4]

---

3. At the conference regarding the Petition for Writ of Certiorari filed by Petitioner John Crane in *Atwell*, this Court asked for the Solicitor General to submit a brief regarding the U.S. Government's views.

4. Although undersigned counsel recognize the importance of the issues raised in the two Pennsylvania cases noted above, counsel's paramount duty to those clients in securing the judgments precludes counsel from acquiescing to the petitions for writs of certiorari there, especially where the issue is better presented in the instant case.

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion of the Third Circuit Court of Appeals filed on September 9, 2010. *Kurns v. A. W. Chesterton, Inc.*, 2010 U.S. App. LEXIS 18853 (3d Cir. 2010). (App. A at 1a). Thereafter, Petitioners timely filed a Petition for Rehearing En Banc with the Third Circuit. The Third Circuit denied a rehearing on October 5, 2010. (App. D at 42a). This Court has jurisdiction under 28 U.S.C. § 1254 (2006).

STATUTES INVOLVED

This Petition presents a question of implied field preemption arising from Congress' enactment of the original Boiler Inspection Act, (hereinafter "BIA"), currently codified at 49 U.S.C. §§ 20701-20703 (2007) as the Federal Railroad Safety Act ("FRSA"), and the Safety Appliance Act, (hereinafter "SAA"), 49 U.S.C. §§ 20301 *et seq.*,

The relevant provisions of the BIA are as follows:

49 U.S.C. § 20701 – "Requirements for Use":

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances –

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

The relevant portions of the FRSA, 49 U.S.C. § 20106 are as follows:

> (a) **National Uniformity of Regulation**
>
> (1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.
>
> (2) A state may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order-
>
> (A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) **Clarification Regarding State Law Causes of Action.**

(1) Nothing in this section shall be construed to pre-empt an action under State law seeking damages for personal injury, death, or property damage alleging that a party-

(A) has failed to comply with the Federal standard of care established by a regulation order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) had failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) **Jurisdiction.** Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

The relevant portions of the SAA are:

49 U.S. C. § 20302 - "General Requirements":

(a) General. **Except as provided in subsection (c) of this section and section 20303 of this title [49 USCS § 20303], a railroad carrier may use or allow to be used on any of its railroad lines—**

(1) a vehicle only if it is equipped with—

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if—

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power

or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

(b) Refusal to Receive Vehicles Not Properly Equipped. **A railroad carrier complying with subsection (a)(5)(A) of this section may refuse to receive from a railroad line of a connecting railroad carrier or a shipper a vehicle that is not equipped with power or train brakes that will work and readily interchange with the power or train brakes in use on the vehicles of the complying railroad carrier.**

(c) Combined Vehicles Loading and Hauling Long Commodities. **Notwithstanding subsection (a)(1)(B) of this section, when vehicles are combined to load and haul long commodities, only one of the vehicles must have hand brakes during the loading and hauling.**

(d) Authority to Change Requirements. **The Secretary may—**

(1) change the number, dimensions, locations, and manner of application prescribed by the Secretary for safety appliances required by subsection (a)(1)(B) and (C) and (2) of this section only for good

cause and after providing an opportunity for a full hearing;

(2) amend regulations for installing, inspecting, maintaining, and repairing power and train brakes only for the purpose of achieving safety; and

(3) increase, after an opportunity for a full hearing, the minimum percentage of vehicles in a train that are required by subsection (a)(5)(B) of this section to be equipped and used with power or train brakes.

(e) Services of Association of American Railroads. **In carrying out subsection (d)(2) and (3) of this section, the Secretary may use the services of the Association of American Railroads.**

STATEMENT OF THE CASE

A. Form of Action and Procedural History

On June 13, 2007, George Corson ("Mr. Corson") and his wife, Freida E. Jung Corson ("Mrs. Corson"), filed a complaint in the Philadelphia County Court of Common Pleas because Mr. Corson contracted malignant mesothelioma, the only generally-accepted cause of which is asbestos exposure.[5] Mr. Corson died from this disease on November 17, 2007. His daughter, Gloria Gail Kurns ("Mrs. Kurns"), was thereafter appointed Executrix of his Estate and was substituted as a party-plaintiff. Mrs. Kurns and her mother, Mrs. Corson, are Petitioners herein.

Defendants including respondents RFPC and VIAD moved for summary judgment in state court. Generally, the defendants argued that there was insufficient evidence of Mr. Corson's exposure to asbestos from their respective products to merit trial. *See Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008). The state court denied RFPC's and VIAD's motions for summary judgment, but granted the summary judgment motions filed by the other defendants, including Soo Lines Railroad, the successor to Milwaukee Road.

On May 13, 2008, following the grants of summary judgment to some defendants and the voluntary

---

5. Respondents did not contest the mesothelioma diagnosis nor did they contest that Mr. Corson's mesothelioma was caused by asbestos exposure.

dismissal of other defendants, including the first captioned defendant, A.W. Chesterton, Inc., RFPC removed the case to the United States District Court for the Eastern District of Pennsylvania. After the case was removed, Petitioners asked the District Court to reconsider the state court grants of summary judgment to Defendants Soo Line Railroad, Airco/BOC and Westinghouse Air Brake.[6] Chief District Court Judge James T. Giles denied Petitioners' reconsideration motions on the grounds that the district court lacked jurisdiction over the defendants who had won summary judgment in the state court. (App. C at 40a).

RFPC and VIAD moved for summary judgment in the District Court. This time, both defendants claimed that federal law preempted Petitioners' claims. On February 5, 2009, District Court Judge Mitchell S. Goldberg granted RFPC's and VIAD's summary judgment motions. (App. B at 22a).

---

6. Airco Welders Supply, Inc./The BOC Group ("Airco/BOC"), now doing business as part of Linde, LLC, was a party to the Superior Court appeal. *See Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008). The Pennsylvania Superior Court dismissed the appeal as interlocutory due to the existence of the removed claims in federal court that are the subject of this appeal. *Kurns v. Airco Welders Supply, Inc.*, 986 A.2d 1293 (Pa. Super. 2009).

A.W. Chesterton was voluntarily dismissed by Appellants in the state court action on April 25, 2008, prior to removal to the District Court. The only remaining non-dismissed defendants in the state court action prior to removal were RFPC and VIAD. *Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008) at *2-3.

Petitioners appealed to the United States Court of Appeals for the Third Circuit on March 4, 2009. The Third Circuit affirmed the District Courts orders on September 9, 2010. (App. A at 1a). On September 22, 2010, Petitioners moved for a rehearing en banc, which the Third Circuit denied on October 5, 2010. (App. D at 42a). This petition for Writ of Certiorari followed.

B. Facts Necessary to the Disposition of the Case

From 1949-1974, Mr. Corson was exposed to asbestos from his work on the Chicago, Milwaukee, St. Paul & Pacific Railroad (the "Milwaukee Road"). He worked on locomotives manufactured by the Baldwin Locomotive Company, predecessor-in-interest to Respondent VIAD Corporation ("VIAD"). These locomotives were insulated with asbestos. The locomotives also had asbestos-containing brake shoes distributed by Respondent Railroad Friction Products Corporation ("RFPC"), which Mr. Corson had to change on a regular basis.

Mr. Corson testified during his deposition that he first worked for the Milwaukee Road in Mobridge, SD in 1949. He moved to Montana, and continued to work for the Milwaukee Road there. As a machinist's helper, he worked on Baldwin steam-powered locomotives.[7] Pipefitters, boilermakers, tinsmiths and painters worked near him. The pipefitters removed old insulation from the boilers and installed new insulation. The pipefitters also used asbestos cement and tape.

---

7. Mr. Corson knew that the locomotives were manufactured by Baldwin because the name was on the front of the engine, below the boiler.

Sometimes old insulation was ground up into a powder, mixed with water, and re-used as a paste. Mr. Corson handled what he called "rigid asbestos." This came in sheets and insulated the boiler. His work on boiler valves required him to handle the insulation around the boiler. Once a year, the machinists would remove all the asbestos from the boiler so they could test the strength of the metal by tapping all around the boiler with a hammer. The pipefitters replaced all the insulation except that around the valves, which the machinists replaced.

In the 1960s and into the early 1970s, Mr. Corson's son, Terry Corson ("Terry"), worked with him at Lewistown, MT. Terry testified that the Milwaukee Road had different varieties of brake shoes in stock at Lewistown, including grinding shoes, freight car shoes and locomotive shoes. There was usually a pallet of freight car shoes and a pallet of locomotive shoes on hand, and each pallet held hundreds of shoes. Terry estimated that he and his father changed about a dozen brake shoes a week. They used COBRA composition brake shoes[8] on both boxcars and locomotives. Terry did not recall using any other brand. Terry testified that his father was a "working foreman" who did brake changes himself. Mr. Corson worked on the Milwaukee Road until 1974.

Mr. Corson was diagnosed with asbestos-caused malignant mesothelioma in 2007, and he died from this disease.

---

8. As stated in Petitioners' original Complaint and conceded in RFPC's motion, RFPC distributed COBRA asbestos-containing railroad brake shoes.

REASONS FOR GRANTING THE PETITION

CONGRESS DID NOT INTEND THE FEDERAL RAILROAD SAFETY ACTS[9] TO PREEMPT STATE LAW-BASED TORT LAWSUITS.

A. This Court has consistently allowed railroad workers and non-railroad workers alike to sue the entities subject to the railroad safety acts under state law.

In its decision in this case, the Third Circuit held that federal legislation preempted the field of railroad safety regulation so as to preclude state tort lawsuits against companies that supplied asbestos-containing equipment to the railroads. In so ruling, the Third Circuit relied upon this Court's decision in *Napier v. Atlantic C. Ry. Co.*, 272 U.S. 605 (1926). For the reasons that follow, this Court's review is necessary to correct the Third Circuit's and other lower courts' gross misinterpretations of this Court's decisions with respect to railroad safety regulations.

In *Napier*, this Court held that federal safety legislation and regulations occupied the field of "legislation." *Napier* struck down state laws that required particular kinds of locomotive equipment, such as firebox doors or cab curtains, on locomotives traveling through a particular state. 272 U.S. at 609-610. Since

---

9. This Court has repeatedly held that the FRSA, BIA, SAA and FELA are to be read as one. *Urie v. Thompson*, 337 U.S. 163 (1949). In this Petition for Certiorari, Petitioners sometimes refer to these acts as a group as "railroad safety acts."

locomotive components were potentially within the federal government's scope of authority, the states could not legislate even in the absence of federal government action: "We hold that state ***legislation*** is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field." *Id.* at 612. (emphasis added). The field was thus defined as "legislation."

For the first 70 years following *Napier*, this Court and other courts of last resort at the state level interpreted *Napier* as establishing the primacy of federal establishment of railroad safety standards. However, in giving precedence to the federal standards, this Court and other courts allowed injured parties to remediate violations of those standards through state tort law remedies.

Typical of the cases decided after *Napier* is *Tipton v. Atchison, T. & S. F. R. Co.*, 298 U.S. 141 (1936). In *Tipton*, a California railroad switchman, not engaged in interstate commerce, was injured as a result of a defective coupling mechanism. *Id.* at 145. This Court found that injury resulted from a violation of the federal standards. *Id.* at 146. In construing the Safety Appliance Act ("SAA"), this Court held:

> The Safety Appliance Acts impose an absolute duty upon an employer and prescribe penal sanctions for breach. The earliest, that of 1893, affected only cars which were being used in interstate commerce. By the Act of 1903 the duty was extended to all cars used upon any railroad which is a highway of interstate commerce. The absolute duty imposed

> necessarily supersedes the common law duty of the employer. But, unlike the Federal Employers' Liability Act, which gives a right of action for negligence, the Safety Appliance Acts leave the nature and the incidents of the remedy to the law of the states. The Safety Appliance Acts modify the enforcement, by civil action, of the employe's common law right in only one aspect, namely, by withdrawing the defense of assumption of risk. They do not touch the common or statute law of a state governing venue, limitations, contributory negligence, or recovery for death by wrongful act.
>
> *Id.* at 146

Thus, Tipton was left to state remedies, which in this case, were limited to workers compensation. *See also, Gilvary v. Cuyahoga V. R. Co.*, 292 U.S. 57 (1934).

In *Fairport, P. & E.R. Co. v. Meredith*, 292 U.S. 589 (1934), this Court upheld a personal injury verdict based upon a finding that the defendant railroad had violated the SAA's requirements as to brakes. Defendant's train hit plaintiff's automobile at a grade crossing. Plaintiff was not a railroad employee, and her claim was not governed by FELA. This Court ruled that she could sue for a violation of the SAA and that her right to bring her suit "derived from principles of common law." *Id.* at 598. The Supreme Court held that issues other than the railroad's duty to comply with the specific requirements of the SAA were governed by state law. *Id.* Had *Napier* been read as broadly as defendants

suggest, the *Meredith* lawsuit would have been preempted.

In *Atchison, T. & S.F. R. Co. v. Scarlett*, 300 U.S. 471 (1937), a railroad worker was injured when descending a ladder from a box car. The ladder itself was a required safety appliance. The worker's foot slipped on a slanting brace rod, which was immediately behind the ladder. The ladder itself conformed to the federal regulations promulgated under the SAA, and as a result, this Court held that there was no violation of the SAA. *Id.* at 472. This Court nevertheless found that the worker had a common law remedy sounding in negligence for the proximity of the slanting brace rod to the ladder:

> The right of recovery, if any, must therefore rest upon the effect of the near proximity of the ladder to the rod, neither being in itself defective. The law to be applied to that situation is the common-law rule of negligence, and not the inflexible rule of the Safety Appliance Act; and the questions to be answered are whether the two appliances were maintained in such relation to one another as to constitute negligence on the part of the company and, if so, whether Scarlett assumed the risk.
>
> *Id.* at 475

Contrary to Respondents' reading of the law following *Napier*, this Court allowed the lawsuit. The worker was prevented from arguing to the jury that there was strict

liability because the ladder complied with the Safety Appliance Act. *Id.* at 474. Given that this Court cited *Napier* in this decision, and that this Court remanded the case for a trial on the negligence claim, this Court clearly did not construe the railroad safety acts as precluding such lawsuits.

In *Breisch v. Central R. of N. J.*, 312 U.S. 484 (1941), this Court recognized the principle decided in *Tipton*: "It is clear that an employee injured in intrastate transportation by defective equipment of an interstate railroad comes under the Safety Appliance Acts. Nor is there any longer a question as to the power of the state to provide whatsoever remedy it may choose for breaches of the Safety Appliance Acts. The federal statutes create the right; the remedy is within the state's discretion. (Footnotes and citations omitted)." *Id.* at 486. In *Breisch*, this Court recognized that a railroad employee not engaged in interstate commerce could afford himself of a state court common law remedy against the railroad, despite the existence of the Workers Compensation Act.

Despite *dicta* in *Napier* that could have been interpreted so as to preclude all state regulation of railroad safety, many states enacted legislation or regulations that affected the railroads. For example, Iowa directed that all railroad operate cabooses with two platforms. The railroad complained that Iowa had no right to enforce such a regulation. In *Fleming v. Richardson*, 24 N.W. 2d 280 (Ia. 1946), the Iowa Supreme Court upheld the regulation against a preemption argument. In a later case, the Iowa Supreme Court explained its rationale:

> An exercise by a state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive the two acts cannot be reconciled or consistently stand together. *Fleming v. Richardson*, 237 Iowa 808, 830, 831, 24 N.W.2d 280; *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915; *Terminal R. Assn. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571; 15 Am. Jur.2d, Commerce, section 69, page 714; and 15 C. J. S., Commerce, section 11, page 266.
>
> *Powers v. McCullough*, 140 N.W. 2d 378, 382 (Ia. 1966)

Because the SAA said nothing about the number of platforms on cabooses, Iowa was free to regulate.

In *Shields v. Atlantic C. L. R. Co.*, 350 U.S. 318 (1955), this Court held that an independent contractor had a right of action against the railroad under state law in strict liability for violating the Safety Appliance Act. There was no suggestion whatsoever that the Safety Appliance Act precluded a lawsuit against the railroad. This Court found that the independent contractor was owed a duty:

> There is no merit in respondent's contention that, since petitioner is not one of its employees, no duty is owed him under § 2 of the Act. Having been upon the dome running

> board for the purpose of unloading the car, he was a member of one class for whose benefit that device is a safety appliance under the statute. As to him, the violation of the statute must therefore result in absolute liability. *Coray v. Southern Pacific Co.*, 335 U.S. 520; *Brady v. Terminal Railroad Assn.*, 303 U.S. 10; *Fairport, P. & E.R. Co. v. Meredith*, 292 U.S. 589; *Louisville & N.R. Co. v. Layton*, 243 U.S. 617.
>
> *Id.* at 325

Not a single member of the Court, either in the majority or the dissent, suggested that plaintiff did not have a remedy under state tort law for the alleged Safety Act violation.

Another typical case is *Boyer v. Atchison T. & S. F. R. Co.*, 38 Ill. 2d 31 (1967), *cert. denied*, 390 U.S. 949 (1968). There the railroad passenger, traveling on a free pass issued by the railroad, sued to recover for violation of the SAA because he was thrown to the floor when a defective coupler broke. The passenger was allowed to press a claim in state court under strict liability. Again, the passenger's right to assert the state court action was unquestioned.

By the time that the Pennsylvania Supreme Court decided *Norfolk & W. R. Co. v. Pa. Public Util. Com.*, 489 Pa. 109 (1980), the parameters of *Napier*, *Tipton* and *Shields* were generally understood to restrict states from legislating or regulating in conflict with the Interstate Commerce Commission ("ICC") or Federal Railroad Administration ("FRA"). The Pennsylvania

Supreme Court also took guidance from the 1970 legislative history of the FRSA:

> Appellees urge that *Napier* and *Bessemer* are controlling on the issue of preemption by the Boiler Inspection Act. We disagree. While the broad language of the Act at one time could have been interpreted as reflecting Congressional intent to preempt the entire field of railroad safety, the enactment of section 205 of the Federal Railroad Safety Act in 1970 no longer permits that reading. Section 205 provides:
>
> > A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. [footnote omitted].
>
> *Id.* at 120-121.

It is noteworthy that the Pennsylvania Supreme Court's interpretation of the FRSA and the harmonization of *Napier* with some of the cases cited above continued for sixteen (16) years without change.

Manufacturers and suppliers of railroad products became regulated entities under the FRSA, along with the railroads in 1992. 45 U.S.C. § 34. The stampede to deprive railroad workers injured by defective products from pressing claims against those manufacturers and suppliers began in earnest thereafter. Ignoring the more than 70 years of precedent noted above, the 9th Circuit ruled that *Napier* prevented railroad workers alleging hearing losses from pressing state law tort claims against the manufacturers and suppliers of devices that caused the hearing losses. *Law v. GMC*, 114 F.3d 908 (9th Cir. 1997). Relying upon *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983), the court in *Law* held that the Boiler Inspection Act preempted the products liability case against the locomotive manufacturers. Since *Marshall* is the underpinning of *Law*, it is important to analyze.

In *Marshall*, the widow of a motorist killed at a grade crossing by a Burlington Northern train sued the railroad. The theory of recovery was that the train should have been equipped with oscillating lights and/or strobe lights. The *Marshall* court did give the FRSA broad preemptive effect. 720 F.2d at 1153. However, the *Marshall* court also pointed out that the FRA had considered requiring trains to be equipped with the equipment that the plaintiff argued was necessary to prevent the accident in question, but that the agency had rejected that requirement. 720 F.2d. at 1153-1154.

Thus, the theory of recovery was in direct conflict with the federal regulatory requirement because it took on the character that the federal agency should have mandated a particular requirement that it rejected..

Law expanded the *Marshall* view of preemption by reading *Napier* literally and broadly without any of the limitations imposed by such decisions as *Tipton* or *Shields*, supra. The *Law* court failed to mention that in 1992, Congress amended the safety acts to subject manufacturers and suppliers of railroad equipment to federal regulation and potential fines for non-compliance. 45 U.S.C. § 34 (Pub. Law 102-365, § 9(a)(8)). The railroads had been subject to safety acts since 1893 and understood that they were subject to state tort lawsuits for violations of federal safety standards. However, the manufacturers of railroad products ignored the decades of court decisions that allowed state tort lawsuits against the regulated entity, viz. the railroads. The manufacturers took a more aggressive stance: since they were subject to federal regulation, they reasoned, there could only be a federal remedy for violations of those regulations, and state remedies were preempted. The *Law* court accepted this argument in order to effectuate "national uniformity of regulations." 114 F.3d at 110-111.

The *Law* court noted that injured railroad workers could make a claim under FELA for their injuries, and that "[p]roof of a BIA violation is enough to establish negligence as a matter of law and neither contributory negligence nor assumption of risk can be raised as a defense." Railroad workers who are injured by trains which are "in use" can make a strict liability claim under

the BIA or SAA. However, railroad workers who are injured as a result of working on trains in the repair shops, such as Mr. Corson in this case, cannot make strict liability claims under the BIA or SAA.

This Court has rarely ruled upon what constitutes "in use." *See, Brady v. Terminal R Ass'n*, 303 U.S. 10, 13 (1938). On those rare occasions when the issue has arisen, the lower appellate courts have uniformly held that the BIA and SAA "exclude those injuries directly resulting from the inspection, repair, or servicing of railroad equipment located at a maintenance facility." *Steel v. Burlington Northern, Inc.*, 720 F.2d 975 (8th Cir. 1983); *Angell v. Chesapeake & O.R Co.*, 618 F.2d 260, 262 (4th Cir. 1980); *Tisneros v. Chicago & N.W. Ry. Co.*, 197 F.2d 466 (7th Cir. 1952), *cert. denied*, 344 US 885 (1952). Put somewhat differently, neither the BIA nor the SAA applied to Mr. Corson since he was injured as a result of exposure to asbestos that occurred in the railroad repair shops. It stands to reason that if the statute does not give Petitioners a claim, it cannot preclude Petitioners from other remedies.

Without question, *Law* began the "reign of error." However, just because a number of lower courts have followed *Law* does not make it correct. As noted above, this Court has never endorsed the broad reading of implied federal field preemption that the literal language of *Napier* suggested. Rather, this Court in later decisions interpreted *Napier* as applying to the field of federal legislation (and regulation), and where there were conflicts, this Court upheld the supremacy of federal law. By granting certiorari in this case, this Court can reestablish the harmony in this Court's

decisions interpreting *Napier*, harmony that existed before the decision in *Law* and the misguided decisions following *Law*.

B. Neither the Safety Appliance Act nor the Boiler Inspection Act contained preemptive language, and subsequent reenactments have evidenced congressional intent not to preempt state regulation.

The legislative history of the railroad safety acts documents congressional intent to allow state tort lawsuits. Beginning in 1893 with the adoption of the first Safety Appliance Act, the railroads were subject to state court lawsuits. This Court held that Congress had the power to require safety devices on every railroad engaged in interstate commerce, even if the particular cars were only engaged in intrastate commerce. *Southern R. Co. v. United States*, 222 U.S. 20 (1911). The primary purpose of the railroad safety acts was to protect trainmen and the riding public. *Urie v. Thompson*, 337 U.S. 163 (1949).

The original SAA and BIA contained no statement of congressional intent to preempt state regulation or state tort lawsuits. In 1970, though, in enacting the FRSA, Congress declared that it did not want to preempt state regulations, and therefore, state-based remedies. *See* H.R. REP. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 1970 WL 5692 (Leg. Hist.).

> At the present time where the federal government has authority, with respect to rail safety, it preempts the field. With respect to

> the reported bill, the task force recommended that existing state requirements remain in effect until preempted by federal action.
>
> H.R. REP. 91-1194, at 4108 (emphasis added).

Prior to 1970, the FRA had allowed the states to regulate unless and until the FRA chose to regulate in the same area. The purpose of the 1970 amendments was to confer congressional approval on this practice. The legislative history of the FRSA demonstrates that Congress believed that its goal of protecting railroad workers' safety could best be accomplished by recognizing state authority over some rail safety matters. The FRSA authorized state regulation in "any area of rail safety" until preempted by an action of the Secretary (i.e. a regulation or order, not a statute) "with respect to the particular matter." It did so for the stated purpose of "promot[ing] safety in all areas of railroad operations":

> Summary of the Reported Bill
>
> The Purpose of this bill is to promote safety in all areas of railroad operations, to reduce railroad related accidents, and to reduce deaths and injuries to persons and damage to property caused by accidents involving any carrier of hazardous materials.
>
> To provide the legislative framework to achieve this purpose, the reported bill includes,
>
> * * *

4. State Regulation

> Section 205 **authorizes states to regulate** in **any area of railroad safety** until the Secretary acts with respect to the **particular** subject matter.
>
> *Id.*, at 4112 (emphasis added).

The final recommendations in the legislative history contain the same federal and state relationship, namely that the power to regulate matters of rail safety be continued in the states, and even expanded, unless and until a federal regulation specifically preempted the state regulation:

> The specific recommendations of this task force are:
>
> * * *
>
> 3. Existing state rail safety statutes and regulations remain in force until and unless preempted by federal regulation. Administration of the program should be through a federal-state partnership, including state certification similar to the certification principles set forth in the federal natural gas pipeline safety act of 1968.
>
> *Id.*, at 4129.

Congress decided to retain the provisions of the BIA and SAA intact, but at the same time precluded any

preemptive effect previously attributed to them, except when federal law or regulations conflicted with state law or regulations. That is the meaning of the legislative history. While the legislative history documents that the BIA and SAA would "continue without change," the same paragraph of the legislative history also documents that the BIA and SAA would continue to be supplemented by state law. Had Congress intended that the BIA and SAA preempt state law, Congress would not have set forth the following language:

> These particular laws have served well. In fact the committee chose to continue them without change. It is recognized, however, that they meet only certain and special types of railroad safety hazards. ... Consequently, there is a strong consensus which makes it appear clearly that the time is now here for broadscale federal legislation with **provisions for state participation to assure a much higher degree of railroad safety in the years ahead.**
>
> *Id.* at 4105 (emphasis added)

As can be seen above, in its 1970 reenactment of the BIA and SAA, Congress adopted a specific lack of preemption clause, now codified at 49 U.S.C. § 20106(a). The lack of preemption clause broadly applies to "railroad safety matters."

In cases decided after the passage of this reenactment, this Court has validated congressional intent in specifying the degree to which federal

legislation should have or not have a preemptive effect. Where a statute contains an express preemption clause, as the FRSA does here, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Under *Easterwood*, the clause cited above in the 1970 reenactment should be given such effect. Congress did not intend to preempt state law tort claims.

Congress not only recognized state regulatory authority in the preemption clause cited above, but also expressly recognized that the states' authority over rail safety extends to "railroad equipment" and "rolling stock." Congress provided that a "State may participate in [investigations and surveillance] activities when the safety practices for **railroad equipment**, facilities, **rolling stock**, and operations in the State are **regulated by a State authority**..." 49 U.S.C. § 20105 (emphasis added).[10] Had Congress wished to occupy the field, Congress would not have included this express recognition of already-existing state authority, which the 1970 amendments expanded.

In 2007, Congress amended the FRSA, adding Section (b) to the prior enactment.[11] The statute now reads:

---

10. Rolling stock refers to rail cars and locomotives, which are also the subject of the BIA and SAA. 49 C.F.R. § 224.5.

11. Section (a) has been the law since 1970, except for a homeland security reference.

(a) National uniformity of regulation

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A state may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order-

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) Clarification regarding State law causes of action.

(1) Nothing in this section shall be construed to pre-empt an action under State law seeking damages for personal injury, death, or property damage alleging that a party-

(A) has failed to comply with the Federal standard of care established by a regulation order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) had failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) Jurisdiction. Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

49 U.S.C. § 20106 (b) (2007).

Under this revised statute, Congress showed its continued intent to reject the expansive and outdated preemptive effect that this Court gave the BIA and SAA in *Napier*. Since the Third Circuit mistakenly based its opinion on that reading, this Court should entertain review.

This Court has stated that it regards § 20106(a)(2) as "a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses." *Easterwood*, 507 U.S. at 665 (citation omitted).

The Secretary of Transportation through the FRA has never issued a regulation or an order "covering the subject matter" of asbestos in railroad equipment, the asbestos content of brake shoes, or warning of the risk of asbestos exposure at railroad worksites. 49 U.S.C. § 20106(a)(2). There is no express regulation or order with which a state tort lawsuit based upon could conflict. This Court found that Congress' use of the word "covering" within the first savings clause in § 20106(a)(2) has the effect of narrowing the scope of preemption. *Easterwood*, 507 U.S. at 664. The party claiming that railroad regulations preempt state law for a subject matter "must establish more than that they 'touch upon' or 'relate to' that subject matter, for 'covering' is a more restrictive term which indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Id.* (internal citation omitted). Since there are no federal regulations that "substantially subsume" the subject matter of Petitioners' tort claims against Respondents, the Third Circuit was wrong in holding that Petitioners' claims were preempted.

The FRA has never addressed asbestos, nor has it ever issued regulations on asbestos or in-shop safety. The word "asbestos" does not even appear in the FRA regulations, 49 C.F.R. §§ 200 through 268.[12] Prior to the adoption of the Occupational Safety and Health Act, the FRA left shop safety to the states to regulate. In 1978, after the creation of Occupational Safety and Health Administration ("OSHA"), the FRA stated that it would henceforth rely on OSHA to regulate workshop safety, and it so stated in 49 C.F.R.§ 221 (1978):

> We, therefore, believe that the FRA must exercise a continuing role in the area of railroad occupational safety and health. However, given the present staffing level for field investigation and inspection, the FRA has determined that, at this time, it would not be in the best interests of the public and of railroad safety for this agency to become involved extensively in the promulgation and enforcement of a complex regulatory scheme covering in minute detail, as do the OSHA standards, working conditions which, although located within the railroad industry, are in fact similar to those of any industrial workplace. Rather, we believe that the proper role for FRA in the area of occupational safety in the immediate future is one that will concentrate

12. The Fourth Circuit also noted this lack of regulation in 1976 in *Southern R.R. v. OSHRC*, 539 F.2d 335 (4th Cir. 1976), *cert. denied* 419 U.S. 999 (1976): "The Department of Transportation and FRA do not purport to regulate the occupational health and safety aspects of railroad offices or shop and repair facilities." 539 F.2d at 338.

> our limited resources in addressing hazardous working conditions in those traditional areas of railroad operations in which we have special competence.
>
> 49 C.F.R.§ 221 (1978).

The OSHA standards expressly do not preempt state law claims. The OSHA savings clause, 29 U.S.C. § 653(b)(4) (1970), states that nothing "...shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."

Assuming *arguendo* that the Third Circuit's view of implied federal field preemption over railroad safety was correct, the railroad safety regulations could not preclude Petitioners' lawsuits. The FRA narrowed the field of federal regulation by excluding railroad shops from the ambit of its regulations. The federal railroad safety regulations can only preempt lawsuits regarding situations and parties to which the regulations apply. The regulations do not apply to repair shops. OSHA's regulations, which do not preempt state tort lawsuits, do apply. Consequently, the Third Circuit should not have affirmed summary judgment.

C. This Court should abandon implied federal field preemption.

To the extent that lower courts have erred by interpreting *Napier* in its broadest sense, that error can be corrected by this Court's abandonment of the doctrine of implied federal field preemption. *Napier* expressed the prevailing view of this Court in the late 19th century and early 20th century that when Congress acted within its powers in enacting a statute, the states could no longer regulate within the field of that statute. This Court held that any remedy for inadequate regulation must be addressed to the ICC, the federal agency that regulated the railroads in 1926. *Napier*, 272 U.S. at 613.

Despite the broad language of *Napier*, until recently the case was regarded by this Court as a conflict preemption case. In the years following *Napier*, the states began to share responsibility for railroad regulation, with the acquiescence, if not the support, of the ICC. Although the repair and maintenance facilities of the railroads were instrumental in the safety of locomotives and rolling stock, the ICC never regulated them. The various states did, however, exercise authority over those facilities. By the time that the FRSA was enacted in 1970, many state regulations regarding railroad safety were on the books. [13]

---

13. The view of this Court regarding federal preemption had changed dramatically by the time the FRSA was adopted. *Compare Napier v. Atlantic C. Ry. Co.*, 272 U.S. 605 (1926), with *Terminal R. Ass'n v. Brotherhood of R. Trainmen*, 318 U.S. 1 (1943).

Petitioners attempted to persuade the Third Circuit that it should analyze the statutes and regulations involved in this case using the two-fold analysis this Court adopted in *Wyeth v. Levine*, — U.S. —, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009), but the Third Circuit rejected Petitioners' suggestion in a footnote. This case presents this Court with the opportunity to prevent such error going forward by replacing implied federal field preemption with the express preemption and conflict preemption analysis this Court adopted in *Wyeth*.

In *Wyeth*, this Court held that federal courts should not presume that preemption was intended unless Congress clearly showed its desire to preempt:

> Our answer to that question must be guided by two cornerstones of our preemption jurisprudence. First, "the purpose of Congress is the ultimate touchstone in every preemption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996); *see Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 11 L. Ed. 2d 179 (1963). Second, "[i]n all preemption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers to the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Lohr*, 518 U.S., at 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (*quoting Rice v. Santa Fe Elevator Corp.*,

331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)).

129 U.S. at 1194-1195, 173 L.Ed. at 60. (emphasis added).[14]

Applying the *Wyeth* two-fold analysis to the instant case, the first question is whether Congress demonstrated an intent to preempt state product warning requirements in railroad shops. Such intent must be viewed against the absence of regulations on the subject issues by the FRA, and the FRA's specific intent not to issue regulations. There is no express statement of preemption in the statute. The second question is whether state law either conflicts with or thwarts congressional purpose, or whether state law makes it impossible for the Respondents to comply with both federal railroad regulations and state failure-to-warn products liability law. *Id.* at 1196-1200, 173 L.Ed. at 62-66.

In *Wyeth*, this Court noted that Congress stated a clear intent to preempt state court law on product

---

14. The Third Circuit stated that *Wyeth* was a conflict preemption case, and therefore not controlling in a field preemption case. This Court has observed more than once that field preemption is but a species of conflict preemption. *See Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88, 102 n.2 (1992); *English v. General Elec. Co.*, 496 U.S. 72, 75 n.5 (1990). *Wyeth* itself relied on several field preemption cases, including *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *California v. ARC Am. Corp.*, 490 U.S. 93 (1989); and *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96 (1963).

warnings on vaccines [16] and tobacco.[17] Here, neither Congress nor the FRA has ever expressed such an intent regarding warnings about the hazards of asbestos products in railroad repair shops.[18] The Third Circuit failed to specify any federal regulation that conflicted with the state law on which Petitioners' *failure-to-warn* claim is based. There is simply nothing in the United States Code or the Code of Federal Regulations remotely incompatible with a state requiring a warning label of the danger of asbestos on a product package. Under *Wyeth*, Respondents had the burden to demonstrate that compliance with state tort law on warnings on the use of hazardous products actually conflicted with federal purposes, or would make it impossible for them to comply with federal regulations. *Wyeth*, 129 S. Ct. at 1203-1204, 173 L.Ed. 69-70. The Third Circuit failed to perform this required analysis.

It is respectfully suggested that the instant case offers this Court the opportunity to provide clarity by

---

16. 42 U.S.C. § 300aa-22(b)(1) (1987).

17. 15 U.S.C. § 1334(b) (2009).

18. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), this Court found that even in areas of obvious field preemption, such as nuclear energy, state tort claims were not barred. Congress had to enact a specific statute in response to this Court's holding in *Silkwood* to preempt. Thus, in *Silkwood*, *Easterwood*, as well as in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), this Court has consistently applied the presumption against preemption, and held that in the absence of federal statutory or regulatory issuances covering the area, there was no preemption, particularly of state tort claims for injury.

dispensing with the outmoded notion of implied federal field preemption in favor of express preemption and conflict preemption.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

RICHARD P. MYERS
Counsel of Record
ROBERT. E. PAUL
1608 Walnut St., Suite 500
Philadelphia, PA 19103
(215) 735-9200
rpaul@prmpclaw.com

Attorneys for Petitioners
Gloria Gail Kurns and Freida E. Jung Corson

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 9, 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1634

GLORIA GAIL KURNS,
Executrix of The Estate of George M. Corson,

Deceased,

FREIDA E JUNG CORSON,
Widow In Her Own Right

v.

A.W. CHESTERTON INC., et al.; BOC INC., Airco Welders Supply Inc.; RAILROAD FRICTION PRODUCTS CORPORATION; VIAD CORP.

Gloria Gail Kurns; Freida E. Jung Corson,

Appellants.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Civil No. 08-2216)
District Judge: Hon. Mitchell S. Goldberg

Argued January 11, 2010

Appendix A

Before: RENDELL, AMBRO, and CHAGARES, *Circuit Judges*

Filed September 9, 2010

OPINION

CHAGARES, *Circuit Judge.*

Appellants Gloria Gail Kurns and Freida E. Jung Corson brought suit on behalf of the decedent, George M. Corson, asserting a number of state law causes of action related to his alleged exposure to asbestos during his years employed by a railroad company. While the suit was filed in state court, the matter was removed to federal court on the basis of diversity jurisdiction, and the District Court granted the appellees Viad Corporation and Railroad Friction Products Corporation's motions for summary judgment, holding that the plaintiffs' claims were all preempted by the Locomotive Inspection Act, 49 U.S.C. § 20701, *et seq.* ("LIA"). The plaintiffs appeal from the District Court's entry of summary judgment on behalf of the appellees and argue that their claims are not preempted by federal law. For the reasons set forth below, we will affirm.

I.

From 1947 to 1994, George M. Corson (the "decedent") worked as a welder, machinist, and supervisor for the Chicago, Milwaukee, St. Paul, & Pacific Railroad. He was employed at different facilities

in Montana and South Dakota. Much of his job involved removing insulation from locomotive boilers and putting brake shoes on the locomotives. The plaintiffs claim that throughout this time period, the decedent was repeatedly exposed to asbestos from the insulation and the brake shoes. After his retirement, the decedent was diagnosed with malignant mesothelioma, the only known cause of which is exposure to asbestos. He passed away after the initiation of this litigation, and is represented by both his widow and the executor of his estate.

The plaintiffs sued the two appellees, as well as a number of other defendants (fifty-nine defendants in all), in Pennsylvania state court, seeking to recover compensatory and punitive damages for the harmful effects to the decedent's health resulting from his exposure to asbestos. The plaintiffs alleged that the decedent installed brake pads containing asbestos that were manufactured and sold by Railroad Friction Products Corporation ("RFPC"). They further alleged that Viad was a successor in interest to a different company that manufactured and sold engine valves, also containing asbestos, which the decedent installed. Viad moved for summary judgment on the grounds that the plaintiffs' claims were preempted by federal law, but the state court denied that motion. All of the defendants then moved for summary judgment on the grounds that there was insufficient evidence linking their products to the decedent's exposure to asbestos. The state court granted these motions with regard to all of the defendants except Viad and RFPC.

Appendix A

The plaintiffs brought this case in state court because one of the other original defendants defeated diversity jurisdiction, but when the state court granted that defendant's motion for summary judgment and that party was released from the case, there was complete diversity of citizenship between the parties. At that point, Viad and RFPC removed the case to the District Court. Once in federal court, the defendants again filed a motion for summary judgment on the grounds that the plaintiffs' claims were preempted by federal law.

On February 5, 2009, the District Court granted summary judgment in favor of RFPC and Viad, holding that the plaintiffs' state law product liability tort claims were preempted by federal law, namely the LIA.[1] The District Court held that the LIA occupies the field of regulating locomotives and locomotive parts used in interstate commerce based on the Supreme Court's decision in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 613, 47 S. Ct. 207, 71 L. Ed. 432 (1926), in which the court explained that the LIA occupies the field

---

1. The LIA provides, *inter alia*, that:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances —
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury.

49 U.S.C. § 20701.

of locomotive equipment.[2] The District Court rejected the plaintiffs' contention that federal law only preempted state regulations involving locomotives which were "in use" at the time, and that since their case involved the actual installation, repair, and removal of locomotive parts, federal preemption did not apply. The Court held that there was no indication in the law that Congress intended to make such a distinction. Finally, the Court rejected the plaintiffs' claim that the Federal Railroad Safety Act ("FRSA") materially abrogated the scope of federal preemption of the entire field of railroad parts. The Court held that the FRSA had not changed the scope of LIA preemption to such an extent that it would no longer preempt the plaintiffs' claims.

The plaintiffs filed a timely appeal from the District Court's order.

II.

The District Court had diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1). This Court has jurisdiction under 28 U.S.C. § 1291. We review a district court's order granting summary judgment under a plenary standard of review. *Curley v. Klem*, 298

---

2. The District Court noted that other district courts in our circuit have reached similar conclusions. *See, e.g., Consol. Rail Corp. v. Pa. Pub. Util. Comm'n*, 536 F. Supp. 653, 655 (E.D. Pa. 1982) (holding that the LIA preempts the field of locomotive equipment and therefore states cannot regulate speed recorders in locomotives), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982).

F.3d 271, 276 (3d Cir. 2002). Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a grant of summary judgment, we view all evidence in the light most favorable to the non-moving party, and will affirm only if there is no genuine issue of material fact. *Startzell v. City of Phila.*, 533 F.3d 183, 192 (3d Cir. 2008).

III.

On appeal, the plaintiffs contend that state law design defect and failure to warn product liability claims are not preempted by the LIA. The plaintiffs urge that the LIA preempts the regulation of locomotive equipment, but does not preempt "railroad workers' personal injury claims under state tort law for failure to warn about hazardous substances released during the repair of locomotives which [are] not in service." Plaintiffs' Br. at 19. We disagree and hold that the plaintiffs' claims are preempted by the LIA.

A.

We first turn to the plaintiffs' contention that the LIA does not preempt a state law or regulation related to working conditions in a facility that manufactures, installs, repairs, or removes locomotive parts and appurtenances.

Appendix A

The doctrine of preemption is grounded in the Supremacy Clause of Article VI of the Constitution, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI. Under that clause, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free v. Bland*, 369 U.S. 663, 666, 82 S. Ct. 1089, 8 L. Ed. 2d 180 (1962). In cases like the present one, courts are called upon to determine whether an act of Congress preempts state law. *See Deweese v. Nat'l R.R. Passenger Corp.*, 590 F.3d 239, 245 (3d Cir. 2009).

There are three distinct types of federal preemption: express preemption, implied conflict preemption, and field preemption. *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985); *Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 238-39 (3d Cir. 2009). Express preemption occurs when a federal law contains express language providing for the preemption of any conflicting state law. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001). Implied conflict preemption occurs when it is either "impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941) (citation omitted)). The final type of preemption, which is relevant to this

case, is field preemption, which arises when a state law or regulation intrudes upon a "field reserved for federal regulation." *United States v. Locke*, 529 U.S. 89, 111, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (1990).

When determining whether a federal law or laws serve to preempt an entire field, "[o]ur inquiry into the scope of a statute's pre-emptive effect is guided by the rule that '[t]he purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 129 S. Ct. 538, 543, 172 L. Ed. 2d 398 (2008) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)); *see also Deweese*, 590 F.3d at 246. In doing so, we consider the intended purpose of the federal regulatory scheme, and what impact any state regulation would have on that scheme. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373-74, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000). The Supreme Court has recognized that there is a presumption against field preemption unless congressional intent to preempt is clear and manifest. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992).

The LIA[3] was originally passed in 1911, and was amended in 1915 and 1924. In pertinent part, it provides

---

3. The LIA was originally known as the Boiler Inspection Act, or BIA, and is referred to as such in much of the case law cited and quoted throughout this opinion. We simply note that this is a distinction without a difference, and both terms refer to 49 U.S.C. § 20701, *et seq.*

that "[a] railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances — (1) are in proper condition and safe to operate without unnecessary danger of personal injury . . . ." 49 U.S.C. § 20701. While the statute itself is silent as to any preemptive effect, one can easily understand how a state law or action which regulates whether a locomotive or any of its parts and appurtenances "are in proper condition and safe to operate" could conflict with federal safety regulations.

The Supreme Court has explicitly addressed the question of the scope of LIA preemption. In *Napier*, the Court held that "the power delegated to the [Interstate Commerce] Commission[4] by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances."[5] 272

---

4. The LIA initially conferred regulatory authority over the construction and material of locomotives and appurtenances to the Interstate Commerce Commission. That regulatory authority has since been transferred to the Department of Transportation. 45 U.S.C. § 28.

5. In a later decision, the Court defined the scope of "every part of the locomotive and tender and of all appurtenances" as "[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission." *S. Ry. Co. v. Lunsford*, 297 U.S. 398, 402, 56 S. Ct. 504, 80 L. Ed. 740 (1936).

(Cont'd)

U.S. at 611. The Court went on to "hold that state legislation is precluded, because *the Boiler Inspection Act, as we construe it, was intended to occupy the field.* The broad scope of the authority conferred upon the Commission leads to that conclusion." *Id.* at 613 (emphasis added).[6] The Court also specifically noted that the delegation of powers to a federal agency meant that any state law in that area was preempted, regardless of whether the agency actually exercised those powers:

(Cont'd)

The plaintiffs urge that the LIA only governs "on the road injuries" and is irrelevant when a locomotive is not "in use." Plaintiffs' Br. at 20. The plaintiffs are correct that *liability* under the LIA only exists if the locomotive was in use at the time of the accident. *See Crockett v. Long Island R.R.*, 65 F.3d 274, 277 (2d Cir. 1995). Here, however, the plaintiffs are not asserting or contesting liability under the LIA. But even if the fact that the locomotive parts and appurtenances that allegedly contained asbestos in the present case were not connected to a locomotive which was in transit at the time of exposure prevents the plaintiffs from bringing an action under the LIA, there are other federal causes of action available for such a claim, as discussed *infra*. This has no impact on the scope of preemption.

6. We are of course bound by a direct holding of the Supreme Court of the United States. To the extent that the plaintiffs argue that more recent decisions of the Supreme Court imply that the Court may now view this issue differently, we simply note that the Supreme Court has held that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

> It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power.

Id. The Court also explicitly addressed the issue of congressional intent, holding that although the original LIA did not show that Congress intended federal law to preempt the entire field, it was clear from the law as amended that this was precisely what Congress intended. *Id.* at 611.[7]

Thus, the LIA preempts a broad field relating to the health and safety of railroad workers, including requirements governing the design and construction of locomotives, as well as equipment selection and installation. *Id.* at 611-12; *see also Urie v. Thompson*, 337 U.S. 163, 191-93, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949)

---

7. The plaintiffs engage in a lengthy discussion of implied conflict preemption under *Wyeth v. Levine*, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009). Implied conflict preemption occurs when Congress has not displaced all state law in an area, but state law actually conflicts with federal law. *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 243 (3d Cir. 2008). Because we find that field preemption under the LIA bars the plaintiffs' claims, we need not analyze implied conflict preemption.

(holding that the LIA covers claims relating to railroad employees' health, including diseases as well as accidents); *Oglesby v. Del. & Hudson Ry. Co.*, 180 F.3d 458, 460 (2d Cir. 1999) ("Through [the LIA] and other acts, [Congress] conferred on the Interstate Commerce Commission (and now the Department of Transportation) full authority over virtually all aspects of locomotive safety to the exclusion of the states."); *Law v. Gen. Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1996) ("It has long been settled that Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment.").

Here, the brake pads and engine valves that allegedly caused asbestos exposure during installation are clearly locomotive equipment and are therefore within the scope of the LIA. *See Oglesby*, 180 F.3d at 461 (holding that an engineer's seat in a locomotive is obviously within the scope of the LIA). The plaintiffs concede that regulations regarding locomotive equipment are preempted by the LIA, but contend that this preemption does not bar state tort law product liability claims, including failure-to-warn claims, arising from the installation of locomotive parts. However, we find that the plaintiffs' claims "fall[ ] squarely within the field of employment hazards that the [LIA] was intended to cover." *Id.* at 462.

The goal of the LIA is to "prevent the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them." *Id.* at 461 (quotation marks

omitted); *see also Law*, 114 F.3d at 910 ("The virtue of uniform national regulation 'is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state.'" (quoting *S. Pac. Transp. Co. v. Pub. Util. Comm'n of Or.*, 9 F.3d 807, 811 (9th Cir. 1993))). In order to accomplish this goal, suits against manufacturers of locomotive parts for product liability claims should be included in the scope of the LIA's field preemption, particularly because the LIA governs both the design and the construction of a locomotive's parts.[8] *See Oglesby*, 180 F.3d at 462 ("[T]he results that Congress had hoped to obtain through the [LIA] would be accomplished best by including the manufacturer within the statute's coverage.").

If each state had its own standards for liability for railroad manufacturers, equipment would have to be

---

8. The plaintiffs also argue that even if this Court holds that their negligence and other state law claims are preempted by the LIA, their claim for failure to warn is not preempted because it involves a failure to place a warning label on some of the products in question, and does not directly involve the parts and appurtenances themselves. This is merely an attempt at artful pleading. The gravamen of the plaintiffs' claim is still that the decedent suffered harmful consequences as a result of his exposure to asbestos contained in locomotive parts and appurtenances. The plaintiffs may not merely rebrand a claim in order to avoid preemption. *See Oglesby*, 180 F.3d at 461 (rejecting a plaintiff's attempt to differentiate failure to warn cause of action from other product liability claims, calling it "a distinction without a difference"); *see also Law*, 114 F.3d at 910-13 (treating failure to warn claim as a product liability claim).

designed so that it could be changed to fit these standards as the trains crossed state lines, or adhere to the standard of the most restrictive states. *First Sec. Bank v. Union Pac. R.R. Co.*, 152 F.3d 877, 880-81 (8th Cir. 1998); *Law*, 114 F.3d at 910-11; *cf. British Airways Bd. v. Port Auth. of N.Y. & N.J.*, 558 F.2d 75, 83 (2d Cir. 1977) (holding that if states were allowed to pass laws or regulations impacting the airline industry, "[t]he likelihood of multiple, inconsistent rules would be a dagger pointed at the heart of commerce"). Congress's goal of uniform railroad equipment regulation would clearly be impeded by state product liability suits against manufacturers, the purpose of which is, in part, to persuade defendants to comply with a standard of care established by the state. *See Law*, 114 F.3d at 911. Furthermore, there is "no doubt" that the design of locomotive parts and warning requirements are within the scope of the Secretary of Transportation's authority. *Id.* As the Court of Appeals for the Ninth Circuit has observed:

> The [LIA] preempts any state action that would affect the "design, the construction, and the material" of locomotives. *Napier*, 272 U.S. at 611. Imposing tort liability on railroad equipment manufacturers would do just that, by forcing them to conform to design and construction standards imposed by the states. This would transfer the regulatory locus from the Secretary of Transportation to the state courts — a result the [LIA] was clearly intended to foreclose.

Id. at 911-12.

Appendix A

While no federal court of appeals has faced the precise issue of whether the LIA preempts state law causes of action arising out of workplace exposure to asbestos in the course of manufacturing or working with railroad parts, the highest courts in a number of states have considered this issue, and those courts have unanimously held such claims to be preempted. *See, e.g.*, *Darby v. A-Best Prods. Co.*, 102 Ohio St. 3d 410, 2004 Ohio 3720, 811 N.E.2d 1117, 1125-26 (Ohio 2004); *In re W. Va. Asbestos Litig.*, 215 W. Va. 39, 592 S.E.2d 818, 822 (W. Va. 2003); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171, 176-80 (Ala. 2002); *Scheiding v. Gen. Motors Corp.*, 22 Cal. 4th 471, 93 Cal. Rptr. 2d 342, 993 P.2d 996, 998-1004 (Cal. 2000). The Supreme Court of West Virginia, after conducting an exhaustive survey of the relevant case law, concluded:

> In spite of the strong presumption against federal preemption . . . . an overwhelming body of case law persuades us that, through passage of the Boiler Inspection Act, Congress has occupied the field of railroad safety so pervasively that plaintiffs' claims against the defendants are preempted. We do not reach this conclusion lightly, but find any other path blocked by an avalanche of adverse authority from other jurisdictions, both state and federal.

In re W. Va. Asbestos Litig., 592 S.E.2d at 822 (footnote omitted).

We agree with the vast majority of courts that have been called upon to decide the issue of the scope of LIA preemption. In *Napier*, the Supreme Court clearly held that in its amendments to the LIA, Congress intended to preempt all state laws, regulations, and causes of action which involve "the design, the construction, and the material of every part of the locomotive and tender of all appurtenances." 272 U.S. at 611. The plaintiffs' claims undeniably involve the material used in locomotive parts, both of which fall under the definition of "parts and appurtenances" of locomotives, *S. Ry. Co. v. Lunsford*, 297 U.S. 398, 402, 56 S. Ct. 504, 80 L. Ed. 740 (1936), and therefore are preempted by federal law. *See Napier*, 272 U.S. at 611.

We agree with the District Court's determination that Congress's intent in enacting and amending the LIA was to preempt completely the field of railroad parts and appurtenances, and that the locomotive components which are the subject of the plaintiffs' product liability action undoubtedly fall within that category.

B.

The plaintiffs urge that the LIA does not purport to encompass the field of safety in the manufacture of locomotives because the Occupational Health and Safety Act of 1970, 29 U.S.C. § 651, *et seq.*, governs working conditions in a repair shop. However, the plaintiffs' claims do not involve hazardous working conditions. Instead, the plaintiffs assert product liability claims (failure to warn and design defect claims) against the

manufacturers of certain locomotive parts that allegedly contained asbestos. "Working conditions" refers to the "environmental area in which an employee customarily goes about his daily tasks." *Columbia Gas of Pa., Inc. v. Marshall*, 636 F.2d 913, 916 (3d Cir. 1980) (quotation marks omitted). We also note that the District Court pointed out the difference between claims involving railroad working conditions, *see Terminal R.R. Ass'n of St. Louis v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 2, 63 S. Ct. 420, 87 L. Ed. 571 (1943) (upholding an Illinois law requiring cabooses), and a claim, as here, emanating from the material used to construct locomotive parts.

Further, we note that federal law offers recourse to workers exposed to asbestos under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, which provides a federal cause of action for any railroad employee injured on the job due to employer negligence. Contrary to the plaintiffs' claims, LIA and FELA provide a broad, reasonable, and comprehensive legal framework under which railroad industry employees injured by employer negligence may seek damages. *See Law*, 114 F.3d at 912 (discussing the availability of claims brought under FELA as recourse for injuries suffered by railroad industry employees in the course of their employment). FELA has been recognized as the appropriate avenue of relief in several of the state supreme court cases discussed *supra*, which held that tort claims claiming asbestos exposure and seeking recourse under state law were preempted by the LIA. *See, e.g., In re W. Va. Asbestos Litig.*, 592 S.E.2d at 822, n.2; *Scheiding*, 993 P.2d at 1001.

C.

The plaintiffs also argued before the District Court, adopting the reasoning of the Pennsylvania Supreme Court in *Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission*, 489 Pa. 109, 413 A.2d 1037 (Pa. 1980), that the FRSA narrowed the scope of the LIA's preemption of state laws and regulations regarding locomotive equipment. We disagree.

The *Norfolk & Western* decision is the lone exception to the nearly unanimous interpretation of the breadth of LIA preemption. In *Norfolk & Western*, the Supreme Court of Pennsylvania rejected the assertion that the LIA completely preempted the field of railroad equipment. 489 Pa. 109, 413 A.2d 1037. The court held that "[w]hile the broad language of the Act at one time could have been interpreted as reflecting Congressional intent to preempt the entire field of railroad safety, the enactment of section 205 of the Federal Railroad Safety Act in 1970 (FRSA) no longer permits that reading." *Id.* at 1043. Section 205, in relevant part, provided that "[a] state may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary (of Transportation) has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. The court held that in certain circumstances this statute enabled states to enact rules which regulated railroad safety.

Significantly, however, no court outside of Pennsylvania has followed this ruling or its reasoning. Just two years after *Norfolk & Western* was decided, in fact, a federal district court in Pennsylvania explicitly rejected *Norfolk & Western* as being incompatible with *Napier. Consol. Rail Corp. v. Pa. Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982) (table opinion). That court, noting that the express purpose of the FRSA was to maintain broad federal regulatory authority and ensure nationwide uniformity of locomotive standards, held:

> [I]n areas already governed by the Locomotive Inspection Act, the states had no regulations. If the Railroad Safety Act were to change the preemption test for those areas, the states could expand their regulatory authority, allowing a new reservoir of differing, and possibly incompatible, railroad-safety law. This would run counter to Congress's purpose of uniform national regulation. It is contrary to Congress's purpose in passing the Railroad Safety Act to allow the states to reoccupy fields from which they previously had been displaced. Thus, I conclude that Congress did not intend the preemption provision of the Railroad Safety Act to modify the total-preemptive effect of the Locomotive Inspection Act.

Id. at 656-57 (footnotes omitted). We similarly reject the reasoning of the *Norfolk & Western* court, and agree that *Napier* compels a holding of preemption.

As previously noted, when determining whether a state law cause of action is preempted, our "'ultimate touchstone'" is Congress's purpose in passing a certain law. *Altria Group, Inc.*, 129 S. Ct. at 543 (quoting *Medtronic, Inc.*, 518 U.S. at 485). While the plaintiffs assert that Congress's purpose in passing § 205 was to allow increased state regulation over railroad safety, this is flatly contradicted by the language of the statute itself, which provides that "[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a). The Act authorizes the Secretary of Transportation to "prescribe regulations and issue orders *for every area of railroad safety* . . . ." 49 U.S.C. § 20103(a) (emphasis added). We hold that in passing the FRSA, Congress did not intend it to disturb the existing framework of federal preemption of the railroad industry established by the LIA.

The FRSA has had no impact on the Department of Transportation's oversight of locomotive-related workplace safety issues. The Federal Railroad Administration ("FRA"), an agency within the Department of Transportation, has specifically investigated and addressed the question of asbestos in locomotive components, and concluded that the "FRA does not feel that further action with respect to the presence of asbestos in locomotive cabs is warranted at this time." Federal Railroad Admin., U.S. Dep't of Transp., Rep. To Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996) at 10-12.

Because the express purpose of the FRSA was to maintain, not decrease, federal uniform regulation of the railroad industry, we reject the rationale of the Supreme Court of Pennsylvania's *Norfolk & Western* opinion, and reject the plaintiffs' argument that the FRSA narrowed the scope of LIA preemption as it applies to product liability claims arising out of locomotive parts and appurtenances.

IV.

For these reasons, we will affirm the judgment of the District Court.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSLVANIA FILED FEBRUARY 3, 2009

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KURNS, et al.,

Plaintiffs,

v.

A.W. CHESTERTON, et al.,

Defendants.

CIVIL ACTION NO. 08-2216

OPINION

GOLDBERG, J.

February 3, 2009

This case involves state law tort claims brought by plaintiffs, George Corson, and his wife, Freda Jung Corson, alleging that Mr. Corson had been exposed to asbestos products over the course of his twenty-eight year career as a machinist/welder for the Milwaukee

Road Railroad.[1] The lawsuit asserts that Mr. Corson, who passed away subsequent to the filing of the complaint, contracted mesothelioma through exposure to defendants' products.

Presently before the Court are defendants' Motions for Summary Judgment, which assert that plaintiff's claims for products liability and negligence are preempted by federal law.[2] Plaintiff contends that preemption does not apply and further argues that this Court is bound by a Pennsylvania state court's previous denial of summary judgment in this case. For the reasons stated herein, defendants' motions will be granted.

I. PROCEDURAL HISTORY

On June 13, 2007, plaintiffs initiated suit in the Philadelphia County Court of Common Pleas against fifty-nine defendants. On January 29, 2008, Mr. Corson died from mesothelioma, a cancer that his expert attributed to his lifelong occupational exposure to asbestos and asbestos-containing products. On May 13,

---

1. Mr. Corson was employed with Milwaukee Road Railroad (now Canadian Pacific Railroad) from January 1, 1947 - February 1, 1974. At all times he worked as a machinist/welder and was stationed in various cities within the state of Montana. (Pl.'s Complaint, p. 9).

2. Both defendants claim that plaintiff cannot identify their products as having been the source of asbestos exposure which contributed to plaintiff contracting mesothelioma. However, neither defendant included this argument in their Motions for Summary Judgment other than to preserve the issue.

2008, the case was removed to this Court. As the remaining plaintiff, Mrs. Corson seeks in excess of $ 50,000 in compensatory and punitive damages.[3]

Presently, the only remaining defendants are Railroad Friction Products Corporation [hereinafter "RFPC"] and Viad Corporation [hereinafter "Viad"]. Plaintiff alleges that RFPC manufactured/sold brake pads containing asbestos that were installed by plaintiff. Plaintiff further alleges that Viad was a successor in interest to Baldwin Locomotive, which manufactured/sold engine valves, also installed by plaintiff. The locomotive products plaintiff allegedly came in contact with - brake pads and engine valves, and the work plaintiff performed as a machinist/welder, are important factors in resolving the pending motions.

II. STANDARD OF REVIEW

This court must view the evidence presented by the parties in the light most favorable to the plaintiff, the non-moving party in this instance. *Big Apple BMW, Inc. v. BMW of N. Am., Inc.* 974 F.2d 1358, 1363 (3d Cir. 1992). If, after examining "the pleadings, the discovery and disclosure materials on file, and any affidavits," the court finds there is "no genuine issue as to any material fact," then "the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving parties

---

3. Punitive damages in asbestos cases consolidated under MDL 875 in this District, have been bifurcated, and are not subject to adjudication at this time.

must carry the burden of showing that there is no genuine issue of material fact, entitling the defendants to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the defendants are able to meet their burden, the plaintiffs must go beyond the pleadings to set forth "specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

A motion for summary judgment must be granted against a party that fails to establish the existence of an element essential to that party's case, because such a failure as to an essential element necessarily renders all other facts immaterial. *Celotex Corp.*, 477 U.S. at 322-23. If there is only one reasonable conclusion from the record regarding the potential verdict under the governing law, summary judgment must be awarded to the moving party. *Id.*

III. DISCUSSION

A. Federal Preemption

Federal preemption is premised upon the Supremacy Clause of the United States Constitution, which states, "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Const. art. VI, cl. 2. The Supreme Court has interpreted

the Supremacy Clause as invalidating all state laws that interfere with, or are contrary to, federal law. *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 712, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. 1 (9 Wheat. 1, 211, 6 L. Ed. 23), (1824)). As a result, a federal preemption analysis always starts with a question of congressional intent, and then proceeds to a discussion of state law interaction with the federal law or regulation. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). *See also Medtronic v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) ('[t]he purpose of Congress is the ultimate touchstone' in every preemption case).

Defendants RFPC and Viad maintain that they are entitled to summary judgment because Congress intended to occupy the field of regulation regarding locomotives and locomotive parts and equipment. Both defendants rely on the Boiler Inspection Act, 49 U.S.C. § 20701, (now known as the Locomotive Inspection Act, but historically referred to as the "BIA") as the statute that Congress intended to preempt all state law regulating locomotives and locomotive parts used in interstate commerce. (Defs. RFPC and Viad's Memo. of Law in Support of Mot. for Sum. J., pp. 2, 11).

In pertinent part, the BIA states: "A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances - (1) are in proper condition and safe to operate without unnecessary danger of

personal injury." 49 U.S.C. § 20701 (1994). The Supreme Court has held that the BIA (along with the "Safety Appliance Act"[4], or "SAA") was enacted to serve the congressional purpose of protecting "employees and others by requiring the use of safe equipment" in conjunction with the operation of railroads. *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282, at n.20 (1949).

In *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 613, 47 S. Ct. 207, 71 L. Ed. 432 (1926), the Supreme Court considered several state statutes regulating firebox doors and cab curtains in locomotive engines. The Court found that the state laws were preempted by federal law because Congress intended that the BIA would regulate "the equipment of locomotives." *Id.* at 612. The Supreme Court struck down the state law, reasoning that:

> [T]he power delegated to the [Interstate Commerce] Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances.... We hold that state legislation is precluded because the Boiler Inspection Act, as we construe it, was intended to occupy the field.

---

4. Codified at 49 U.S.C. §§ 20301 *et seq*, the SAA regulates all rail cars, locomotives, tenders or similar vehicles. 49 U.S.C. § 20301(a) (1996).

Id. at 611-13. Here, because plaintiff alleges that Mr. Corson contracted mesothelioma through his contact with locomotive equipment, the reasoning and holding of *Napier* plainly applies.

Napier has been cited and relied upon by Judges in this District facing the same issue. For instance, in *D'Amico v. Garlock*, No. 92-5544, 2007 U.S. Dist. LEXIS 67664 at *2 (E.D. Pa. Sept. 13, 2007)(O'Neill, J), the plaintiff brought state common-law tort claims alleging that he contracted mesothelioma while working as a welder. Plaintiff contended that preemption was inapplicable, and argued that the BIA applied only to railroad carriers and not manufacturers. In reasoning that the preempted field extended to railroad manufacturers, the Court cited to *Napier* as preempting any state action that affects "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at *15 *quoting Napier*, 272 U.S. at 611.[5] The holding of *D'Amico* applies to the instant case, where the brake pads and engine valves at issue are "material" and/or "appurtenances" of a locomotive.

Napier was also relied upon in *Consolidated Rail Corporation v. Pennsylvania Public Utility Commission*, 536 F. Supp. 653, 655 (E.D. Pa. 1982) (Giles,

---

5. The *D'Amico* decision also rejected the argument that the BIA only applies to locomotives which were "in use" and not "in the shop." *D'Amico*, 2007 U.S. Dist. LEXIS 67664 at *18-*19, (discussed *infra* at p. 8).

J.)[6] where a railroad sued the Pennsylvania Public Utility Commission seeking a declaration that a state statute regulating speed recorders and indicators in locomotives was preempted by the BIA and the Federal Railroad Safety Act. The state argued, as plaintiff does here, that federal laws passed after the BIA, such as the Railroad Safety Act, "redistributed railroad regulatory authority so that the total preemption test of the Locomotive Inspection Act [BIA] is no longer valid." *Id.* at 654. In interpreting *Napier*, the court rejected this argument and stated that "Congress intended the Locomotive Boiler Inspection Act to occupy *totally* the field of locomotive equipment." *Id.* at 655 (emphasis added). The court further stressed that validating the state regulation would be "contrary to Congress's purpose in passing the Railroad Safety Act." *Id.* at 657.

In an effort to deflect the holding in *Napier*, and precedent referenced above, plaintiff raises three arguments: 1) The Supreme Court case of *Terminal Railroad v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 2, 63 S. Ct. 420, 87 L. Ed. 571 (1943), which involved railroad working conditions and decided after *Napier*, precludes preemption; 2) Because the BIA exclusively regulates locomotives "in use" and not in repair, preemption is not applicable; and 3) The Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20144, (hereinafter "FRSA"), effectively repealed or restricted

---

6. *Consolidated* was summarily affirmed by both the Third Circuit, 696 F.2d 981 (3d Cir. 1982), and the Supreme Court, 461 U.S. 912, 103 S. Ct. 1888, 77 L. Ed. 2d 280 (1983).

the BIA. These arguments are unpersuasive and addressed below.

First, plaintiff's reliance on *Terminal Railroad*, is misplaced because the state statute at issue there involved working conditions and not, as in this case, "parts" or "appurtenances." Specifically, in *Terminal Railroad*, an Illinois law required cabooses so that rear switchmen were not forced to ride the tops, sides or draw-bars of the rear cars. *Id.* The Court ruled that the Illinois law was a valid regulation, not subject to preemption as it involved the field of regulating working conditions. *Id.* at 8. These circumstances are much different than the facts before this Court which involve claims emanating from work with the material of locomotive parts, an area clearly preempted by Congress through the BIA. *See also, Urie v. Thompson*, 337 U.S. 163, 193, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) (applicable standard of care under the Federal Employer's Liability Act ("FELA"), which creates a statutory remedy for workers harmed from working on locomotives, is determined under the BIA).

Plaintiff next argues that the BIA applies only to locomotives "in use," and not as in plaintiff's case, to locomotives or locomotive parts that are being repaired or prepared for use. (Pl.'s Answer to RFPC's Mot. for Sum. J., p. 3). The Honorable Thomas O'Neill, of this Court, addressed this issue in *D'Amico*, 2007 U.S. Dist. LEXIS 67664 at *1, noting that cases which define when a locomotive is "in use" stem from lawsuits brought under the BIA. *Id., quoting Crockett v. Long Island*

R.R., 65 F.3d 274, 277 (2d Cir. 1995). In *D'Amico*, the "in use" distinction was found to be inapplicable to a preemption analysis because the plaintiff was seeking relief under state law, and not the BIA. Thus, Judge O'Neill properly concluded that "because the BIA preempts the entire field of locomotive equipment, the question of whether decedent was exposed to asbestos from locomotives in use or not in use is irrelevant." *D'Amico*, 2007 U.S. Dist. Lexis 67664 at *19. In fact, all of the cases cited by plaintiff in support of the "in use" argument deal not with state law claims but rather allegations brought against railroad companies under the BIA. (Pl.'s Answer to RFPC's Mot. for Sum. J., p. 3). As plaintiff is seeking relief pursuant to state law tort claims and not the BIA, the issue of whether the locomotive was "in use" or not is inapplicable.

Finally, plaintiff argues that the state law claims are not preempted because the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109 (2007), overruled the *Napier*/BIA preemption test, and allowed state law to govern railroads and locomotives. (Pl.'s Answer to Viad's Mot. for Sum. J., p. 4). Additionally, plaintiff argues that the 2007 amendments to the FRSA[7] apply to this case, further chipping away at the field preempted by the BIA. (Pl.'s Answer to RFPC's Mot. for Sum. J., p. 4).

Plaintiff correctly notes that in undertaking to expand the field for federal regulation regarding railroad

---

7. *Federal Railroad Safety Act*, 49 U.S.C. §20106 (2007) (Amendments effective in September 2007, specifically deemed retroactive from January 18, 2002).

safety, the FRSA announced a narrower rule governing preemption of state law.[8] *Consol. Rail Corp.*, 536 F. Supp. 653, 657 (1982). However, this rule stressed that a state may adopt certain regulations relating to railroad safety *as long as these regulations are "not incompatible with any Federal law."* 45 U.S.C. § 434 (emphasis added). This preemption language also emphasized that the "standards relating to railroad safety shall be nationally uniform to the extent possible." *Id.* Thus, while the FRSA did open the door to permit certain, discrete state railroad regulations, it did not, as plaintiff claims, overrule *Napier* or negate the basic principles of preemption that apply here.

In an attempt to bolster their argument that the FRSA precludes preemption, plaintiff relies heavily upon *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037, 1039 (Pa. 1980),

---

8. The preemption section states:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the same subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standards, and when not creating an undue burden on interstate commerce. 45 U.S.C § 434.

where the Pennsylvania Supreme Court ruled that the BIA did not preempt a state law regulating sanitary disposal devices on locomotives. Plaintiff's reliance on *Norfolk & Western* is misplaced for several reasons.

First, *Norfolk & Western* involved the state's Public Utility Commission's ability to regulate a railroad's practice of discharging human waste on railroad tracks. *Id.* at 1039-40. This type of regulation has no relation to the case at hand, where plaintiff worked on locomotive brake pads and valves, both of which are "parts" falling squarely within the language of the BIA. *See D'Amico*, 2007 U.S. Dist. Lexis 67664 at *17-18.

Second, although the *Norfolk & Western* Court notes that the FRSA did narrow Congressional intent to preempt the field of railroad safety, the legislative history of the FRSA reflects that Congress did not intend to abrogate entirely the preemption doctrine under the BIA. Indeed, instead of repealing, recodifying, or subsuming the BIA when it passed the FRSA, Congress specifically determined that the BIA was working well and should remain in force without any changes.[9] *Consolidated Rail Corporation*, 536 F.Supp. at 656 (legislative history of FRSA reflects that

9. "Over the years there have been several enactments of legislation dealing with certain phases of railroad safety. These include, among others ... (the) Locomotive Inspection Act .... These particular laws have served well. In fact the committee chose to continue them without change." H.R. Rep. No. 91-114, 91st Cong., 2d Sess. 11, reprinted in 1970 U.S. Code Cong. & Ad. News 4104, 4108.

Congress intended no change to the BIA). Consequently, despite the holding in *Norfolk & Western*, the FRSA does not affect the scope of preemption announced in *Napier*.

Lastly, plaintiff is mistaken in asserting that the 2007 amendments to FRSA apply to this case. *See* H.R. Rep. No. 110-336, at 28 (2007), reprinted at 2007 WL 2745328 at *28. Plaintiff relies on the language in the amendments stating that FRSA "does not preempt State law causes of action where a party has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation." *See Id.* This isolated reference ignores, however, the fact that the amendments clearly were directed at the Minot, North Dakota, train derailment occurring on January 18, 2002.[10] In fact, the statute explicitly sets the effective date of the amendments as retroactive to January 18, 2002. *Id.* Because plaintiff's injuries were a result of "activities or events" occurring prior to January 18, 2002, the 2007 FRSA amendments are inapplicable to this case.[11]

---

10. The amendments clarify that the FRSA (U.S.C. § 20106), as amended, applies to all pending state law causes of action arising from activities or events occurring on or after January 18, 2002, the date of the Minot, North Dakota, derailment.

11. In furtherance of the FRSA Amendment argument, plaintiff also relies on *DeFrancisco v. Owens-Illinois*, Docket No. CAM-L-1127-05 (N.J. Super. Ct., Camden Cty., June 2, 2008). There, the New Jersey Superior Court initially adopted the FRSA amendment argument plaintiff raises here. However, (Cont'd)

Appendix B

B. Coordinate Jurisdiction and Law of the Case

Plaintiff also argues that defendant Viad's Motion for Summary Judgment should be denied because Viad previously raised the preemption issue in a motion for summary judgment, which was denied, before removal to federal court, by the Honorable Alan L. Tereshko of the Philadelphia County Court of Common Pleas.[12] Judge Tereshko's ruling was delivered through a single sentence order, which simply denied the motion without any analysis or explanation regarding the basis of the ruling. (See, Pl.'s Answer to Viad's Mot. for Sum. J., Exhibit D). Plaintiff argues that, pursuant to the doctrine of coordinate jurisdiction, this Court must defer to Judge Tereshko's ruling because it is the prior holding of a coordinate court in the same case. *Id.* at 3.

(Cont'd)
that same court subsequently reversed its decision, admitting it had erred because it failed to take into account the 2002 effective date of the September 2007 amendment and the fact that the plaintiff's claims arose from exposure that ended in 1958. The court eventually held that the 2007 amendments to FRSA do not apply to injuries from exposure occurring before January 18, 2002.

12. While Defendant RFPC also filed a Motion for Summary Judgment before Judge Tereshko, that motion pertained to product identification and the issue of preemption was never raised. Thus, even if this Court were bound by Judge Tereshko's ruling, the "law of the case" would only apply to Viad and not RFPC.

Appendix B

Generally, plaintiff claims that the coordinate jurisdiction doctrine applies to coequal courts and stands for the proposition that "a court in the later phases of a litigated matter should not reopen questions decided by another judge of that same court . . . in the earlier phases of that matter." (Pl.'s Answer to Viad's Mot. for Sum. J., p. 3); *citing, Commonwealth v. Starr*, 541 Pa. 564, 664 A.2d 1326, 1331 (Pa. 1995). Therefore, plaintiff contends that because this Court's jurisdiction arises from the diversity of the parties, we are bound by the coordinate jurisdiction doctrine to follow Judge Tereshko's ruling. *Id. Citing, Erie v. Tompkins*, 304 U.S. 64, 78-80, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). In short, the crux of plaintiff's coordinate jurisdiction argument is that this Court must act as a Pennsylvania court and refrain from disturbing the state court's ruling. *Id.* Plaintiff's argument is flawed for several reasons.

First, the denial of a motion for summary judgment is an interlocutory order. *Bines v. Kulaylat*, 215 F.3d 381, 384 (3d Cir. 2000). Thus, if a district court has proper jurisdiction over the case, "it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so." *United States v. Jerry*, 487 F.2d 600, 605 (3d Cir. 1973). Indeed, a federal district court, at any time prior to a final decree, may modify, open or set aside an interlocutory order of the state court. *See General Invest. Co. v. Lake Shore & M.S.R. Co.*, 260 U.S. 261, 267, 43 S. Ct. 106, 67 L. Ed. 244, 1 Ohio Law Abs. 162 (1922); *Bon Air Hotel Inc., v. Time Inc.*, 426 F.2d 858, 862 (5th Cir. 1970); *Wolk v. Teledyne Indust. Inc.*, 475 F. Supp.2d 491, 507-8 (E.D.

Pa. 2007). In order for a federal district court to set aside the order of a state court and rule in the opposite, the court must have cogent and articulable reasons for doing so. *Preaseau v. Prudential Ins. Co. of America*, 591 F.2d 74, 79 (9th Cir. 1979). For reasons expressed *infra*, cogent and articulable reasons to rule differently than Judge Tereshko exist.

We note that Judge Tereshko, as a Pennsylvania trial court judge, is bound by Pennsylvania Supreme Court precedent. As such, his ruling presumably afforded great weight to *Norfolk & Western Ry. Co. v. Pennsylvania Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (Pa. 1980), discussed above. This decision does not, however, constitute binding authority on this Court. In fact, two opinions from this Court decided after *Norfolk & Western* have applied preemption based on the BIA. *See D'Amico*, 2007 U.S. Dist. LEXIS 61664 at *20; *Consol. Rail Corp.*, 536 F. Supp. at 658. This Court's interpretation of the BIA, a federal law, and compelling federal court precedent necessitates the application of preemption. While Judge Tereshko's ruling was afforded great respect, the facts of this case nonetheless, fall squarely within the field preempted by the BIA.

Moreover, this Court is not bound by Judge Tereshko's ruling because a federal preemption analysis is governed by federal, not state law. *Grantham v. Avondale Industries, Inc.*, 964 F.2d 471, 473 (5th Cir. 1992). Plaintiff's assertion that the *Erie* doctrine mandates that we adopt Judge Tereshko's ruling is incorrect because the *Erie* doctrine "does not apply ...

in matters governed by the federal Constitution or by acts of Congress." *Id.* Indeed, federal courts "are not bound by a state court's interpretation of federal law regardless of whether our jurisdiction is based on diversity of citizenship or a federal question." *Id.* As the issue before this Court does not pertain to state law, but rather, hinges on a question of federal preemption, we are free to independently adjudicate defendants' motions.

Finally, Judge Tereshko's ruling provides no basis or explanation for denying Viad's motion, or even the slightest hint as to the facts or law that were relied upon. Nonetheless, plaintiff asks us to discern Judge Tereshko's reasoning through application of a separate and distinct case, *Atwell v. Chesterton*, Philadelphia Court of Common Pleas, May Term, 2004, No. 1366, where Judge Tereshko denied summary judgment with an accompanying "FINDINGS and ORDER." Plaintiff argues that "it is likely" that Judge Tereshko's reasoning in the case before this Court is the same as *Atwell*. (Pl.'s Memo. of Law, p. 2). Following this logic would require a federal court, in applying federal law, to be barred by a state court ruling in a completely separate and distinct lawsuit. Given the clear guidance expressed in *Napier* and subsequent opinions from Judges of this Court applying preemption in similar situations, we are unwilling to take this far a leap. *See Core v. Southwestern Bell Tel.*, 673 F. Supp. 974, 979 (W.D. Ark. 1987)(federal court unwilling to reconsider state court ruling where state court provided absolutely no basis for its decision to deny the motion). *Federal*

Deposit Ins. Corp. v. First Mortg. Inv., 485 F. Supp. 445, 450 (E.D. WI. 1980) (federal court reconsidered state court's denial of motion for summary judgment based on the preliminary and scantily reasoned determination . . . by the state trial court).

IV. CONCLUSION

For the foregoing reasons, I grant both Viad and RFPC's Motions for Summary Judgment. Plaintiff's common law tort claims are preempted by the BIA, a federal law enacted to occupy the field of regulating locomotives, their parts and appurtenances. Furthermore, this Court, exercising its authority to reexamine Judge Tereshko's denial of summary judgment in state court, respectfully declines to follow Judge Tereshko's ruling. An appropriate order follows.

BY THE COURT:

_____

MITCHELL S. GOLDBERG, J.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DENYING RECONSIDERATION OF SUMMARY JUDGMENT ORDERS GRANTED IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS, DATED SEPTEMBER 11, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, CIVIL SECTION – TRIAL DIVISION

CIVIL ACTION
NO.: 08-CV-2216

GLORIA GAIL KURNS, Executrix of The Estate of GEORGE M. CORSON, Deceased, and FREIDA E. JUNGE CORSON, Widow in her own right,

Plaintiffs,

vs.

A. W. CHESTERTON, INC., *et al.*,

Defendants.

ORDER

AND NOW, this 11th day of Sept, 2008, upon consideration of Plaintiffs' Motion for Reconsideration of Summary Judgment to Airco/BOC, and any

response(s) thereto, it is hereby **ORDERED** and **DECREED** that said Motion is hereby **DENIED** without prejudice as this Court is without jurisdiction over this matter.

BY THE COURT:

/s/ _____
James T. Giles

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING EN BANC, FILED OCTOBER 5, 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1634

GLORIA GAIL KURNS,
Executrix of The Estate of George M. Corson,

Deceased,

FREIDA E JUNG CORSON,
Widow In Her Own Right

v.

A.W. CHESTERTON INC, Et Al.; BOC INC, Airco Welders Supply Inc.; RAILROAD FRICTION PRODUCTS CORPORATION; VIAD CORP

Gloria Gail Kurns; Freida E. Jung Corson,

Appellants.

SUR PETITION FOR REHEARING

Present: McKEE, *Chief Judge*, SLOVITER, SCIRICA RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, GREENAWAY, JR. and VANASKIE, *Circuit Judges*

Appendix D

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

MICHAEL A. CHAGARES
Circuit Judge

DATED: October 5, 2010
PDB/cc: All Counsel of Record

OPPOSITION BRIEF

No. 10-879

In the Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENT RAILROAD FRICTION PRODUCTS CORPORATION IN OPPOSITION

JAMES C. MARTIN
Counsel of Record
JOHN L. VITSAS
DAVID J. BIRD
ROBERT H. OWEN
Reed Smith LLP
225 Fifth Ave.
Pittsburgh, PA 15222
(412) 288-3131
jcmartin@reedsmith.com
Counsel for Respondent Railroad Friction Products Corporation

QUESTION PRESENTED

Whether the Court of Appeals correctly held, in conformity with this Court's reasoning in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926), and an "avalanche" of decisions from both federal and state reviewing courts, that the Locomotive Inspection Act, 49 U.S.C. § 20701, et seq., preempts Petitioners' state tort claims involving the design, construction, and safety of railroad equipment?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The plaintiffs are Gloria Gail Kurns, the executrix of the estate of the late George M. Corson, and Frieda E. Jung Corson, the widow of George M. Corson.

The defendants are Railroad Friction Products Corporation ("RFPC") and Viad Corp ("Viad"). All other named defendants were dismissed from the action prior to the decision below.

RFPC is wholly owned by RFPC Holding Corporation, which is wholly owned by Westinghouse Air Brake Technologies, d.b.a. Wabtec Corporation. There is no parent or publicly held corporation owning 10% or more of Westinghouse Air Brake Technologies.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. There Is No Irreconcilable Conflict Among The Federal Courts Of Appeals Or The State Courts Of Last Resort Regarding The Question Presented. 6

II. The Court Of Appeals' Decision Follows And Faithfully Applies The Controlling Law Dealing With The LIA's Preemptive Effect. 13

III. This Case Does Not Raise Any Issue About The LIA's Preemptive Effect That Requires Further Attention From This Court. 17

A. No Decision Of This Court Post-*Napier* Casts Any Doubt On The LIA's Preemptive Effect In This Case. 18

B. No Legislative Action Or Other Development Post-*Napier* Casts Any Doubt On The LIA's Preemptive Effect In This Case. 20

CONCLUSION 23

TABLE OF CITED AUTHORITIES

Cases

Atchison, T.&S.F.R. Co. v. Scarlett,
300 U.S. 471 (1937) 18, 19

Atwell v. John Crane, Inc.,
986 A.2d 888 (Pa. Super. Ct. 2009),
appeal denied, 996 A.2d 490 (Pa. 2010), *petition for cert. pending*, No. 12-272 ..... 12, 13

Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947) 7

Breisch v. Central R. of N.J.,
312 U.S. 484 (1941) 18, 19

California v. Taylor, 353 U.S. 553 (1957) 7

Caradonna v. A.W. Chesterton Co., Inc.,
No. 0106785/2006, 2007 N.Y. Misc. LEXIS 8994
(N.Y. Slip Op. April 25, 2007) 11, 12

Consol. Rail Corp. v. Pa. Pub. Util. Comm'n,
536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*,
696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983) ..... *passim*

Consolidated Rail v. Gottshall,
512 U.S. 532 (1994) 2

Crockett v. Long Island Railroad,
65 F.3d 274 (2d Cir. 1995) 21

D'Amico v. Garlock Sealing Techs., LLC,
No. 92-5544, 2007 WL 2702774
(E.D. Pa. Sept. 13, 2007) 10, 12, 22

Darby v. A-Best Prods. Co.,
811 N.E.2d 1117 (Ohio 2004) 10, 11-12, 20

Fairport, P.&E.R. Co. v. Meredith,
292 U.S. 589 (1934) 18, 19

First Security Bank v. Union Pacific R.R. Co.,
152 F.3d 877 (8th Cir. 1998) 9

Forrester v. American Dieselelectric, Inc.,
255 F.3d 1205 (9th Cir. 2001) 9

Frastaci v. Vapor Corp.,
70 Cal. Rptr. 3d 402 (Cal. Ct. App. 2007) . 11, 12, 22

Gen. Motors Corp. v. Kilgore,
853 So.2d 171 (Ala. 2002) 10, 12, 16, 20

Guss v. Utah Labor Relations Bd.,
353 U.S. 1 (1957) 7

Harris v. A.W. Chesterton, Inc.,
996 A.2d 562 (Pa. Super. Ct. 2010) (TABLE),
appeal denied, 3 A.3d 671 (Pa. 2010), *petition for cert. pending sub nom. Griffin Wheel, Inc. v. Harris*, No. 10-520. ..... 6, 12, 13

In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Ala. on Sept. 22, 1993, 188 F. Supp. 2d 1341
(S.D. Ala. 1999) 11

In re Train Collision at Gary, Ind.,
670 N.E.2d 902 (Ind. App. Ct. 1996) 11

In re W. Va. Asbestos Litig.,
592 S.E.2d 818 (W. Va. 2003) 10, 12, 20

Key v. Norfolk S. Ry. Co.,
491 S.E.2d 511 (Ga. App. Ct. 1997) 11

Law v. Gen. Motors Corp.,
114 F.3d 908 (9th Cir. 1996) 9, 14-15, 16

Lundeen v. Canadian Pac. Ry. Co.,
447 F.3d 606 (8th Cir. 2006) 21

Mandel v. Bradley, 432 U.S. 173 (1977) 9

Mehl v. Canadian Pac. Ry., Ltd.,
417 F. Supp. 2d 1104 (D.N.D. 2006) 21

Mickelson v. Mont. Rail Link, Inc.,
999 P.2d 985 (Mont. 2000) 10

Mo. Pac. R.R. Co. v. R.R. Comm'n of Tex.,
833 F.2d 570 (5th Cir. 1987) 10

Napier v. Atlantic Coast Line Railroad Co.,
272 U.S. 605 (1926) ..... *passim*

Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n, 413 A.2d 1037 (Pa. 1980) 8, 9

Norfolk S. Ry. Co. v. Denson,
774 So.2d 549 (Ala. 2000) 10

Oglesby v. Delaware & Hudson Ry. Co.,
180 F.3d 458 (2d Cir. 1999) 10

R.J. Corman R.R. v. Palmore,
999 F.2d 149 (6th Cir. 1993) 15

Ray v. Atl. Richfield Co., 435 U.S. 151 (1978) 7

Roth v. I & M Rail Link LLC,
179 F. Supp. 2d 1054 (S.D. Iowa 2001) 11

San Diego Building Trades Council v. Garmon,
359 U.S. 236 (1959) 16

Scheiding v. Gen. Motors Corp.,
993 P.2d 996 (Cal. 2000) 10, 12, 16, 20

Seaman v. A.P. Green Indus.,
707 N.Y.S.2d 299 (N.Y. Sup. Ct. 2000) 11, 12, 22

Shields v. Atlantic C.L.R. Co.,
350 U.S. 318 (1956) 18, 19

Southern Pac. Transp. Co. v. Oregon PUC,
9 F.3d 807 (9th Cir. 1993) 15

Southern Ry. Co. v. Lunsford,
297 U.S. 398 (1936) 7, 22

Southern Ry. Co. v. Railroad Comm'n of Indiana,
236 U.S. 439 (1915) 3

Springston v. Consol. Rail Corp.,
130 F.3d 241 (6th Cir. 1997) 9-10

Stevenson v. Union Pac. R.R. Co.,
No. 4:07CV00522BSM, 2009 WL 129916
(E.D. Ark. Jan. 20, 2009) 10

Tipton v. Atchison, T.&S.F.R. Co.,
298 U.S. 141 (1936) 18, 19

U. S. v. Baltimore & O.R. Co.,
293 U.S. 454 (1935) 7

United Transp. Union v. Foster,
205 F.3d 851 (5th Cir. 2000) 10

United Transp. Union v. Long Island R. Co.,
455 U.S. 678 (1982) 1

Urie v. Thompson, 337 U.S. 163 (1949) 2, 3

Wisconsin Dept. of Industry, Labor and Human Relations v. Gould Inc., 475 U.S. 282 (1986) 16

Wright v. Gen. Electric Co.,
242 S.W.3d 674 (Ky. Ct. App. 2007) 11, 12

Wyeth v. Levine,
--- U.S. ----, 129 S.Ct. 1187 (2009) 19

Statutes

Federal Employers' Liability Act,
45 U.S.C. § 51, et seq. 2, 17, 20, 21

Federal Railroad Safety Act,
49 U.S.C. § 20101, et seq. 3
49 U.S.C. § 20103(a) 3, 21
49 U.S.C. § 20106(a) 21

Locomotive Inspection Act,
49 U.S.C. § 20701, et seq. 2

Safety Appliances Act,
49 U.S.C. § 20301, et seq. 2

28 U.S.C. § 1332 5

Other Authorities

Dep't of Transp., FRA, *Railroad Occupational Safety and Health Standards; Termination*,
43 Fed. Reg. 10583 (March 14, 1978) 14

In the Supreme Court of the United States

No. 10-879

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION, ET AL.

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENT RAILROAD FRICTION PRODUCTS CORPORATION IN OPPOSITION

STATEMENT OF THE CASE

1. For more than a hundred years, the federal government has regulated almost every aspect of the railroad industry, including railroad equipment, safety, labor relations, and working conditions. *United Transp. Union v. Long Island R. Co.*, 455 U.S. 678, 687 (1982).

In particular, for the safety of railroad employees, this federal regulation has extended to all aspects of the design, construction, material, and maintenance

of locomotives and railcars. Thus, in 1893, Congress enacted the first of the Safety Appliance Acts ("SAA"), currently codified at 49 U.S.C. § 20301, et seq. Later, in 1911, Congress enacted the Boiler Inspection Act ("BIA"), now known as the Locomotive Inspection Act ("LIA") and currently codified at 49 U.S.C. § 20701, et seq.[1]

Additionally, early in the twentieth century, Congress passed the first Federal Employers' Liability Act ("FELA"), now codified at 45 U.S.C. § 51, et seq., giving railroad employees injured on the job federal remedies against their employers. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994).

The SAA and LIA were enacted with the same Congressional purpose—to protect railroad workers by ensuring that railroad equipment is not unreasonably dangerous—and they are read in *pari materia* with one another and with FELA, which provides for the enforcement of the SAA and LIA and the redress of work-related injuries. *Urie v. Thompson*, 337 U.S. 163, 190 (1949).

Through all of these acts, Congress has created a comprehensive system for the federal regulation of the design, construction, and safety of railroad equipment, including parts and appurtenances, used in interstate commerce, and it has conferred on the

---

[1] The LIA originally was known as the Boiler Inspection Act, or BIA, and is referred to as such in much of the case law cited and quoted in the Court of Appeals' opinion and in this response. References to the LIA or BIA refer to the same statute, 49 U.S.C. § 20701, et seq.

Interstate Commerce Commission (and now the Secretary of the Department of Transportation and his delegate, the Federal Railroad Administration ("FRA")) virtually exclusive authority over railroad safety. *See Southern Ry. Co. v. Railroad Comm'n of Indiana*, 236 U.S. 439, 444-48 (1915) (preemptive effect of the SAA); *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 613 (1926) (preemptive effect of the BIA); *Urie v. Thompson*, 337 U.S. at 182, 188-89 (SAA and BIA work together to regulate safety).

The SAA and LIA and their accompanying federal regulations were supplemented in 1970 by the Federal Railroad Safety Act ("FRSA"), now codified at 49 U.S.C. § 20101, et seq. The FRSA gives broad powers to the Secretary of Transportation to prescribe regulations and issue orders "for every area of railroad safety supplementing [the SSA and LIA and accompanying regulations]." 49 U.S.C. § 20103(a).

2. This pervasive federal regulatory scheme carries legal consequences for actions brought under state law as well. In *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. at 613, this Court first addressed the LIA's preemptive effect on state law. It specifically held that "the power delegated to the [Interstate Commerce] Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 611. This Court went on to "hold that state legislation is precluded, because *the Boiler Inspection Act, as we construe it,*

was intended to occupy the field." *Id.* at 613 (emphasis added).

Consistent with the reasoning in *Napier*, the LIA occupies the regulatory field relating to railroad equipment used in interstate commerce and preempts state laws insofar as they would regulate the design, construction, and safety of such equipment.

3. On June 13, 2007, George M. Corson and Frieda E. Jung Corson brought this products liability action against RFPC, Viad, and others in the Philadelphia County Court of Common Pleas for compensatory and punitive damages for the harmful effects to Mr. Corson's health resulting from his alleged exposure to asbestos when installing brake shoes and engine valves on locomotives and railcars. App. 2a-4a, 23a-24a.[2]

Several of the joined defendants moved for summary judgment on various grounds. The state court granted these motions with regard to all of the

---

[2] Viad allegedly is the successor in interest of a company that manufactured the locomotives and boilers and RFPC allegedly is a distributor of brake shoes—i.e., "parts and appurtenances" that are used interchangeably on locomotives and railcars.

Mr. Corson died on November 17, 2007. Gloria Gale Kurns, the daughter of Mr. Corson and executrix of his estate, subsequently was substituted as a plaintiff. App. 3a, 23a. Contrary to the Petition at 11 n.1, RFPC has not conceded that there was any causal connection between any brake shoe product that it distributed and any injury to Mr. Corson.

defendants except RFPC and Viad. App. 3-4a, 23a-24a.

4. The state court's summary judgment order dismissed the single Pennsylvania defendant whose presence had precluded removal under 28 U.S.C. § 1332. RFPC and Viad subsequently removed the case to federal district court. App. 5a, 23a-24a.

5. Once in federal court, RFPC and Viad moved for summary judgment based on the LIA's preemptive effect. App. 4a-5a, 23a-24a. On February 5, 2009, the district court granted those motions, holding that the LIA preempted Petitioners' state law product liability claims. App. 4a-5a, 23a-24a. Petitioners appealed, and, on September 9, 2010, the Third Circuit Court of Appeals affirmed. App. 1a-21a.

6. Petitioners then sought rehearing and rehearing en banc, and their petition was denied. A timely petition for a writ of certiorari followed. App. 42a-43a.

REASONS FOR DENYING THE WRIT

The *Kurns* petition should be denied because the Court of Appeals' decision does not implicate any irreconcilable conflict of authority among the federal circuit courts of appeals or state courts of last resort. Rather, that decision is consistent with this Court's precedents and an "avalanche" of decisions in federal and state courts establishing the LIA's preemptive effect on state law claims relating to the design, construction, and safety of railroad equipment, including parts and appurtenances used on locomotives and railcars. In addition, that decision does not raise any concerns, real or imagined, about the LIA's preemptive reach.

I. There Is No Irreconcilable Conflict Among The Federal Courts Of Appeals Or The State Courts Of Last Resort Regarding The Question Presented.

This is one of three cases presently pending in this Court that raise the same question about whether the LIA preempts state common law and statutory tort claims by workers allegedly injured by exposure to asbestos contained in equipment, parts, and appurtenances used on locomotives and railcars. The other petitions are *Atwell v. John Crane, Inc.*, No. 10-272 (petition filed Aug. 23, 2010), and *Griffin Wheel, Inc. v. Harris*, No. 10-520 (petition filed Oct. 12, 2010).[3] The question presented in these petitions does not merit further review by this Court because there is no irreconcilable conflict among the federal courts of appeals or the state courts of last resort on the LIA's preemptive reach.

In *Napier*, 272 U.S. at 611-13, this Court addressed the scope of LIA preemption and held that the LIA occupies a broad field of regulation relating to the design, construction, selection, installation, and maintenance of "every part of the locomotive and tender and of all appurtenances" and preempts state laws insofar as they seek to regulate the same subject matter for the safety and welfare of railroad workers.

---

[3] The Court has called for the Acting Solicitor General's views in *Atwell*, *see* 131 S.Ct. 552 (2010). The Court has not acted on the petition in *Harris*, which was distributed for the Conference of December 10, 2010.

This Court repeatedly has reaffirmed the reasoning and holding of *Napier*, most recently by implication via a 1983 memorandum decision affirming the judgment in *Consolidated Rail Corp. v. Pa. Pub. Util. Comm'n*. *See U. S. v. Baltimore & O. R. Co.*, 293 U.S. 454, 459 (1935) (under the LIA, the federal regulator "clearly" has authority to regulate "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances").[4]

Moreover, in the 80 years since *Napier*, it has been settled that the LIA occupies the field of regulation relating to, and preempts state law claims arising from, the design, construction, and safety of all railroad equipment, including materials, parts, and appurtenances. No federal court of appeals or state court of last resort ever has held to the

---

[4] *See also Southern Ry. Co. v. Lunsford*, 297 U.S. 398, 402 (1936) (holding that the BIA encompasses "[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the [Secretary]"); *California v. Taylor*, 353 U.S. 553, 560 n.8 (1957) (citing *Napier* and other cases "upholding the supremacy of federal statutes relating to railroads in interstate commerce"); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 772 (1947) (citing *Napier* and other cases recognizing implied field preemption based on the existence of a comprehensive federal regulatory scheme that leaves no room for the states to supplement it); *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 10 (1957) (same); *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 157 (1978) (same); *Consol. Rail Corp. v. Pa. Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa. 1982) (applying *Napier* and holding that LIA preempted state law requiring locomotives to have speed records and indicators), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983).

contrary, with the singular exception of the Pennsylvania Supreme Court. *See Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980). In *Norfolk & Western*, the Pennsylvania Supreme Court held that the passage of the FRSA in 1970 implicitly altered LIA field preemption and re-opened the field to state regulation.

Norfolk & Western's construction of the FRSA and the LIA is irreconcilable with the plain language and express purposes of the two statutes and has been rejected by every other federal court and state court of last resort that has addressed the LIA's preemptive effect.

Most importantly for purposes of the three pending petitions, however, *Norfolk & Western* was impliedly overruled by this Court only three years after it was issued. *See Consol. Rail Corp.*, 536 F. Supp. at 653, *aff'd mem.*, 696 F.2d at 981, *aff'd mem.*, 461 U.S. at 912. In *Consolidated Rail Corp.*, a plaintiff railroad challenged a Pennsylvania statute that required locomotives to have speed recorders and indicators, contending the BIA preempted this state regulation. Relying on *Norfolk & Western*, the Commonwealth argued that the enactment of the FRSA in 1970 redistributed railroad regulatory authority and implicitly abrogated *Napier*'s LIA field preemption holding. *Id.* The district court expressly rejected *Norfolk & Western*'s reasoning and holding and held that *Napier* was controlling. *Id.* Both the Court of Appeals and this Court affirmed summarily. The Court has made it clear that a summary affirmance must "be understood as ... applying principles established by prior decisions to the particular facts involved," and as "prevent[ing] lower

courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

Concomitantly, this Court's summary affirmance in *Consolidated Rail* must be understood as applying the principles established in *Napier* and its progeny to the particular facts of *Consolidated Rail* to prevent lower courts from concluding, as the *Norfolk & Western* court did, that the FRSA's enactment abrogated *Napier*'s preemption analysis and holding.

Indeed, since *Consolidated Rail Corp.*, courts have heeded its directive. No federal court of appeals or state court of last resort has ever called LIA's preemptive reach into question. On the contrary, a solid phalanx of federal and state court decisions have applied *Napier* and its progeny and held that the LIA preempts state common law and statutory claims against manufacturers and distributors of locomotive and railcar equipment, parts, and appurtenances. This body of case law includes at least eight decisions by six federal courts of appeals (including the decision below),[5] six decisions by five

---

[5] *See Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001) (BIA preempts non-employee product liability actions against manufacturer of locomotive cranes); *Law v. Gen. Motors Corp.*, 114 F.3d 908 (9th Cir. 1997) (BIA preempts design defect and failure to warn claims against manufacturer concerning engine insulation and brake noise); *First Security Bank v. Union Pacific R.R. Co.*, 152 F.3d 877 (8th Cir. 1998) (BIA preempts state common law remedies against railroad manufacturers for injuries arising out of alleged design defects); *Springston v. Consol. Rail Corp.*, 130 F.3d 241 (6th Cir. 1997) (BIA preempts claim based on inadequacy of warning

state courts of last resort,[6] and numerous decisions by federal district courts, state intermediate appellate courts, and state trial courts.[7]

(continued...)

devices); *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458 (2d Cir. 1999) (BIA preempts claim that manufacturer should have placed warning label on defective seat); *United Transp. Union v. Foster*, 205 F.3d 851 (5th Cir. 2000) (BIA preempts statute requiring engine be equipped with signal devices); *Mo. Pac. R.R. Co. v. R.R. Comm'n of Tex.*, 833 F.2d 570 (5th Cir. 1987) (BIA preempts state requirement for emergency equipment).

[6] *See Darby v. A-Best Prods. Co.*, 811 N.E.2d 1117 (Ohio 2004) (BIA preempts state tort claims against the manufacturers of railroad locomotives asserting injury caused by exposure to asbestos contained in railroad locomotives); *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818 (W. Va. 2003) (BIA preempts any state action that would affect the design, the construction, and the material of locomotives); *Gen. Motors Corp. v. Kilgore*, 853 So.2d 171 (Ala. 2002) (BIA preempts claims against manufacturer for use of asbestos in locomotive parts); *Scheiding v. Gen. Motors Corp.*, 993 P.2d 996 (Cal. 2000) (BIA preempts state defective design and failure-to-warn claims against manufacturer); *Mickelson v. Mont. Rail Link, Inc.*, 999 P.2d 985 (Mont. 2000) (BIA preempts common law claims against railroad concerning locomotive equipment); *Norfolk S. Ry. Co. v. Denson*, 774 So.2d 549 (Ala. 2000) (BIA preempts state law claim seeking to hold locomotive manufacturer liable for failure to install air conditioning).

[7] *See Stevenson v. Union Pac. R.R. Co.*, No. 4:07CV00522BSM, 2009 WL 2702774 (E.D. Ark. Jan. 20, 2009) (holding that the BIA preempts a contribution and indemnification claim because the underlying claim was preempted by the BIA); *D'Amico v. Garlock Sealing Techs., LLC*, No. 92-5544, 2007 WL 2702774, at *7 (E.D. Pa. Sept. 13, 2007)

In particular, the Court of Appeals here, and four state courts of last resort, have held expressly that the LIA *does* preempt state common law and statutory tort claims by railroad employees allegedly injured by exposure to asbestos contained in equipment, parts, and appurtenances used on locomotives and railcars. App. 6a-21a; *see Darby*, 811

(continued...)

("Forcing railroad manufacturers to conform to state design and construction standards would naturally impinge on the field of locomotive equipment that Congress occupied through the BIA"); *Roth v. I & M Rail Link LLC*, 179 F. Supp. 2d 1054 (S.D. Iowa 2001) (BIA preempts state law negligence claims against the manufacturer of a locomotive); *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Ala. On Sept. 22, 1993*, 188 F. Supp. 2d 1341 (S.D. Ala. 1999) (BIA preempts passenger and employee common law negligence and design defect claims against Amtrak); *Wright v. Gen. Electric Co.*, 242 S.W.3d 674 (Ky. Ct. App. 2007) (BIA bars state common law tort claims against carriers, locomotive manufacturers, and locomotive component part manufacturers); *Frastaci v. Vapor Corp.*, 70 Cal. Rptr. 3d 402 (Cal. Ct. App. 2007) (BIA forecloses state tort claims against locomotive manufacturers for defective design of their product); *Caradonna v. A.W. Chesterton Co., Inc.*, No. 0106785/2006, 2007 N.Y. Misc. LEXIS 8994 (N.Y. Slip Op. April 25, 2007) (finding claims of railroad worker, against various manufacturers of locomotives and their components and parts, preempted under the BIA); *Seaman v. A.P. Green Indus. Inc.*, 707 N.Y.S.2d 299 (N.Y. Sup. Ct. 2000) (finding federal field preemption under the BIA and accordingly dismissing all claims against locomotive manufacturer); *In re Train Collision at Gary, Ind.*, 670 N.E.2d 902 (Ind. App. Ct. 1996) (BIA preempts claims regarding alleged defects in the design and structure of train cars); *Key v. Norfolk S. Ry. Co.*, 491 S.E.2d 511 (Ga. App. Ct. 1997) (BIA preempts common law claims against railroad by employee injured in fall from locomotive steps).

N.E.2d 1117; *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818 (noting the "avalanche" of authority in favor of LIA field preemption); *Gen. Motors Corp.*, 853 So.2d 171; *Scheiding*, 993 P.2d 996.[8]

There are only two decisions, by a single state's intermediate appellate court, contrary to this "avalanche" of uniformity. *See Atwell v. John Crane, Inc.*, 986 A.2d 888 (Pa. Super. Ct. 2009), *appeal denied*, 996 A.2d 490 (Pa. 2010), *petition for cert. pending*, No. 10-272; *Harris v. A.W. Chesterton, Inc.*, 996 A.2d 562 (Pa. Super. Ct. 2010) (TABLE), *appeal denied*, 3 A.3d 671 (Pa. 2010), *petition for cert. pending sub nom. Griffin Wheel, Inc. v. Harris*, No. 10-520. These decisions, however, do not create a compelling reason or need for this Court to grant review, invest its scarce resources, and add its voice to the chorus.

As an initial matter, this Court rarely grants review based on conflicts involving state intermediate appellate courts. In addition, the decision below is a definitive declaration of the preemptive principles that will control federal courts in Pennsylvania and likely will be influential in any subsequent analysis of the preemption issue undertaken by Pennsylvania's state courts. If Pennsylvania courts follow the Court of Appeals'

---

[8] Other decisions are in accord, uniformly applying the LIA to preempt state common law and statutory claims in these circumstances. *See D'Amico*, 2007 WL 2702774, at *7; *Wright*, 242 S.W.3d at 674; *Frastaci*, 70 Cal. Rptr. 3d at 402; *Caradonna*, 2007 N.Y. Misc. LEXIS 8994, at *1; *Seaman v. A.P. Green Indus.*, 707 N.Y.S.2d at 299.

decision in this case and embrace the controlling rule, then any nascent conflict will be resolved. Moreover, even if the Pennsylvania courts continue to follow the intermediate appellate decisions in *Atwell* and *Harris*, the Pennsylvania Supreme Court can take up the issue with the added benefit of the Court of Appeals' decision below, as well as this Court's controlling decision in *Consolidated Rail Corp.* If the Pennsylvania Supreme Court splits from the unbroken line of cases cited previously, this Court could then intervene based on a genuine conflict among the federal courts of appeals and the state courts of last resort.

II. The Court Of Appeals' Decision Follows And Faithfully Applies The Controlling Law Dealing With The LIA's Preemptive Effect.

The petition also should be denied because the Court of Appeals' decision here is correct and further reinforces the controlling law regarding the LIA's intended preemptive effect. There is, in short, nothing in this case that needs to be fixed.

In *Napier*, 272 U.S. at 611-13, this Court considered a preemption challenge to a Georgia law that required all trains operating in the state to have an automatic fire door and a cab curtain. The Court found that, through the LIA, Congress conferred on the Interstate Commerce Commission the "general" power to regulate the safety of railroad equipment, that the Commission's power extended "to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances," and that the "broad scope" of the LIA's delegation of power to the Commission led to the conclusion that the LIA was intended to occupy the entire field of

regulation and preempt all state laws falling within the scope of the Commission's authority. *Id.*

The Court also specifically noted that the delegation of powers to the federal agency meant that any state law in that area was preempted, regardless of whether the agency actually exercised those powers. *Id.*

The broad scope of the LIA's delegation of regulatory authority to the Interstate Commerce Commission (and now to the Secretary of Transportation, and his delegate, the FRA) and the statute's preemptive effect on state laws and state law claims relating to the design, construction, and material of railroad equipment, parts and appurtenances flows directly from the need to maintain uniformity of railroad operating standards across state lines. As the FRA has pointed out,

> [I]t is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion....
>
> ...
>
> [P]iecemeal regulation of individual hazards ... by any other agency of government would be disruptive and contrary to the public interest.

Dep't of Transp., FRA, *Railroad Occupational Safety and Health Standards; Termination*, 43 Fed. Reg. 10583, 10585-86 (March 14, 1978).

And, as the Ninth Circuit further highlighted in *Law*, "[t]he virtue of uniform national regulation 'is self-evident: locomotive companies need only concern

themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state.'" 114 F.3d at 910 (quoting *Southern Pac. Transp. Co. v. Oregon PUC*, 9 F.3d 807, 811 (9th Cir. 1993)); *see also R.J. Corman R.R. v. Palmore*, 999 F.2d 149, 152 (6th Cir. 1993) ("Th[e] lasting history of pervasive and uniquely-tailored congressional action indicates Congress' general intent that railroads should be regulated primarily on a national level through an integrated network of federal law."). Accordingly, "[a]ny state law that undermines this regime is preempted ...." *Law*, 114 F.3d at 910.

State law statutes or claims attempting to regulate allegedly defective or dangerous railroad equipment thus must be preempted to preserve the uniform and exclusive federal scheme Congress established. As one court explained it:

> "A railroad equipment manufacturer found to have negligently designed a braking system ... is expected to modify that system to reduce the risk of injury. If the manufacturer fails to mend its ways, its negligence may be adjudged willful in the next case, prompting a substantial punitive damages award. If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined."

Gen. Motors Corp., 853 So.2d at 175-76 (quoting *Law*, 114 F.3d at 910-12 (citations and footnote omitted)); *see also Scheiding v. Gen. Motors Corp.*, 993 P.2d at 1003 (same).

Here, the avowed Congressional goal to provide for exclusive and uniform federal regulation regarding the design, construction, and safety of all railroad equipment, including parts and appurtenances, would be undermined if state law tort claims like those urged by Petitioners were allowed. Such claims, in purpose and effect, would intrude on the regulatory field occupied exclusively by the LIA. *See, e.g., San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959) (recognizing that state law remedial actions can be, and are designed to be, a form of state regulation incompatible with a comprehensive federal regulatory and remedial scheme); *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 286-87 (1986) (under *Garmon*, where there is a "complex and interrelated federal scheme of law, remedy, and administration," field preemption principles bar a state from adding to the remedies provided by the integrated federal regulatory scheme).

The Court of Appeals' decision in this case explicates and embraces the rationales underlying this overarching preemptive principle and faithfully applies them to Petitioners' state law tort claims. App. 6a-21a. As the Court of Appeals firmly and definitively concludes:

> The goal of the LIA is to prevent the paralyzing effect on railroads from prescription by each state of the safety

> devices obligatory on locomotives that would pass through many of them. ... In order to accomplish this goal, suits against manufacturers of locomotive parts for product liability claims should be included in the scope of the LIA's field preemption, particularly because the LIA governs both the design and the construction of a locomotive's parts. ...
>
> If each state had its own standards for liability for railroad manufacturers, equipment would have to be designed so that it could be changed to fit these standards as the trains crossed state lines, or adhere to the standard of the most restrictive states.

App. 12a-14a (internal quotations and citations omitted).

On review of the relevant federal statutory scheme, the relevant preemption principles, and the relevant authorities, therefore, it is apparent that the Court of Appeals' decision is on solid footing and reaches the correct result. Its analysis is comprehensive, on point, and leaves nothing further to add. An opinion of that kind does not need or require further review by this Court.

III. This Case Does Not Raise Any Issue About The LIA's Preemptive Effect That Requires Further Attention From This Court.

Despite the uniformity of the case law, Petitioners maintain that the LIA's preemptive effect somehow is in doubt based on decisions rendered by this Court after *Napier*, by subsequent legislative actions, by the limitations on private actions under FELA, and

by regulatory action by the FRA mandating compliance with certain Occupational Safety and Health Administration regulations. None of these contentions has merit and none provides a reason to grant review in this case.

A. No Decision Of This Court Post-*Napier* Casts Any Doubt On The LIA's Preemptive Effect In This Case.

Petitioners claim that the Court of Appeals' decision is contrary to a series of decisions by this Court. Pet. 15-21 (citing *Fairport, P. & E.R. Co. v. Meredith*, 292 U.S. 589 (1934); *Tipton v. Atchison, T.&S.F.R. Co.*, 298 U.S. 141 (1936); *Atchison, T.&S.F.R.Co. v. Scarlett*, 300 U.S. 471 (1937); *Breisch v. Central R. of N.J.*, 312 U.S. 484 (1941); *Shields v. Atlantic C.L.R. Co.*, 350 U.S. 318 (1956)).[9] None of the cited decisions addresses the preemptive scope of the LIA as established in *Napier* or casts doubt on the LIA's preemptive effect on state tort claims concerning the design, construction, and safety of

---

[9] Although these authorities take stage-center in the petition, none was identified by Petitioners, either in their appellate merits briefing or their petition for rehearing, as being relevant to the analysis of the LIA's preemptive reach. App. 1a-21a, 42a-43a. Petitioners therefore are asking this Court to grant certiorari based on an argument about a purported conflict not covered in the briefing below or vetted by the Court of Appeals. Nor is the purported conflict yet exposed in any lower court decisions, much less dispositive decisions from any federal circuit court of appeals or state courts of last resort. Simply put, this is not the sort of conflict or record that provides an adequate basis for this Court to grant review.

federally regulated railroad equipment. Indeed, the cases do not deal with LIA preemption at all.

The earliest of the cases cited in the petition, *Meredith*, 292 U.S. at 589, concerned whether "travelers at railway-highway crossings" have standing to sue a railroad for injuries caused by a failure of the railroad to comply with the SAA. The case had nothing to do with the LIA or its preemptive effect on state law and did not discuss the Court's reasoning or holding in *Napier*.

The same goes for *Tipton*, 298 U.S. at 141. That case concerned the pleading of claims for alleged violations of the SAA in intrastate commerce; the resolution of that question did not involve *Napier* or the LIA or its preemptive reach. *See also Breisch*, 312 U.S. at 484 (same).

Scarlett, 300 U.S. at 471, and *Shields*, 350 U.S. at 318, also are inapposite. *Scarlett* and *Shields* concerned whether brace rods and dome running boards (respectively) were safety devices covered by the SAA. *See Scarlett*, 300 U.S. at 475; *Shields*, 350 U.S. at 318. The Court's analysis in each case was limited to the statutes and regulations relevant to the particular questions presented and did not implicate the preemptive reach of the LIA under *Napier*.[10]

---

[10] Contrary to the petition (at 36-40), *Wyeth v. Levine*, --- U.S. ----, 129 S.Ct. 1187, 1192 (2009), also does not cast doubt on *Napier*'s preemption analysis. *Wyeth* involved principles of conflict preemption; the doctrine of field preemption was not before the Court. *Id.*

On reasoned analysis, Petitioners' attempt to use these unrelated cases to cast doubt on *Napier*'s reasoning and holding collapses. There is no need for this Court to grant review to dispel the non-existent "conflict" that Petitioners have invented and now advance.

B. No Legislative Action Or Other Development Post-*Napier* Casts Any Doubt On The LIA's Preemptive Effect In This Case.

Petitioners also claim that the Court of Appeals' preemption analysis fails to account for subsequent legislative developments, limitations on private actions under FELA, and regulatory actions by the FRA mandating compliance with certain Occupational Safety and Health Administration regulations. But these arguments have been rejected repeatedly by courts that have confronted them. App. 9a-10a n.5, 16a-21a; *see, e.g.*, *Darby*, 811 N.E.2d at 1125-26; *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 823-24; *Gen. Motors Corp.*, 853 So.2d at 176-80; *Scheiding*, 993 P.2d at 999-1004. There is no perceptible reason for this Court to grant review to weigh in on these settled issues.

To begin with, the Court of Appeals properly rejected Petitioners' arguments that the FRSA altered and withdrew LIA field preemption. Pet. 26-33; App. 18a-21a. Any question about the FRSA's impact on LIA field preemption likewise would appear to be answered definitively by this Court's summary affirmance of *Consolidated Rail Corp.* *See supra* pp. 7-11. Contrary to the petition, nothing in the FRSA repeals the LIA or purports to withdraw the federal regulator's power over the entire field

relating to the design, construction, and safety of railroad equipment and parts. In reality, the statute expressly authorizes the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety ..." and provides that "[l]aws, regulations, and orders related to railroad safety ... shall be nationally uniform to the extent practicable." 49 U.S.C. §§ 20103(a), 20106(a).[11]

Furthermore, the Court of Appeals also properly rejected Petitioners' argument that the LIA has no preemptive effect on state law claims related to incidents that occur when a train is not "in use." Pet. 25; App. 9a-10a n.5. Here, Petitioners' argument conflates LIA field preemption with FELA's standard for absolute liability for railroad employers. Under FELA, the absolute liability of railroads for the injuries of their employees depends on whether locomotives and rail cars are "in use" at the time of the accident. *See, e.g., Crockett v. Long Island R.R.*, 65 F.3d 274, 277 (2d Cir. 1995). However, this rule

---

[11] The 2007 FRSA amendment touted in the petition also is irrelevant to any field preemption analysis in this case. The stated purpose of the 2007 amendment was to nullify the effect of two federal court decisions—*Mehl v. Canadian Pac. Ry., Ltd.*, 417 F. Supp. 2d 1104 (D.N.D. 2006), and *Lundeen v. Canadian Pac. Ry. Co.*, 447 F.3d 606 (8th Cir. 2006)—that (1) arose out of a January 18, 2002 Minot, North Dakota train derailment and (2) concern not LIA field preemption, but only an express preemption provision of the FRSA. App. 34a (district court decision collecting authorities). In addition, the 2007 amendment applies only to events occurring on or after January 18, 2002 (the date of the Minot derailment). Here, Petitioners' claims arose from exposure that allegedly began and ended years before the 2007 amendment's effective date.

has nothing to do with the scope of LIA preemption. The field of regulation occupied by the LIA encompasses all aspects of the design, construction, and safety of railroad equipment, parts, and appurtenances—characteristics that remain the same regardless of whether a train is "in use" or "off-line." *See Napier*, 272 U.S. at 611-13; *Lunsford*, 297 U.S. at 402; *see also D'Amico*, 2007 WL 2702774, at *7 (rejecting Petitioners' argument); *Frastaci*, 70 Cal. Rptr. 3d at 403-04, 408-10 (same); *Seaman*, 707 N.Y.S.2d at 302 (same).

Finally, the Court of Appeals likewise got it right in dismissing Petitioners' arguments that the FRA had narrowed the scope of LIA field preemption by ceding regulatory control over locomotives and railcars in repair shops to the Occupational Safety and Health Administration. Pet. 33-36; App. 16a-17a. As the court explained in rejecting Petitioners' assertion, such claims emanate, not from the working conditions of repair shops, but from the "material used to construct railroad equipment, parts, and appurtenances"—areas regulated exclusively by the FRA under the LIA. App. 16a-17a.

In this case, the Court of Appeals' analysis puts all legislative, regulatory, and remedial developments since *Napier* in their proper perspective and shows why they do not impact the analysis of the LIA's intended preemptive reach. No conceivable concerns requiring this Court's attention are raised in any part of that analysis. Petitioners' claims to the contrary lack merit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

March 9, 2011

JAMES C. MARTIN
Counsel of Record
JOHN L. VITSAS
DAVID J. BIRD
ROBERT H. OWEN
Reed Smith LLP
225 Fifth Ave.
Pittsburgh, PA 15222
Tel: (412) 288-3131
Fax: (412) 288-3063
E-mail:
jcmartin@reedsmith.com
Counsel for Respondent
Railroad Friction
Products Corporation

OPPOSITION BRIEF

No. 10-879

IN THE

Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,
Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONSE OF VIAD CORP TO PETITION FOR A WRIT OF CERTIORARI

DANIEL MARKEWICH
ELLEN G. MARGOLIS
AMY KALLAL
MOUND COTTON WOLLAN & GREENGRASS
One Battery Park Plaza
New York, New York 10004
(212) 804-4200

WALTER DELLINGER
JONATHAN D. HACKER
(Counsel of Record)
jhacker@omm.com
ANTON METLITSKY
JOANNA NAIRN*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted in Massachusetts only*

Attorneys for Respondent Viad Corp

QUESTION PRESENTED

Whether the Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.*, preempts state-law tort claims concerning the design, manufacture, or material of locomotives or their parts, as this Court held in *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926).

PARTIES TO THE PROCEEDING

Petitioners are Gloria Gail Kurns and Freida E. Jung Corson, named plaintiffs below.

Respondents are Railroad Friction Products Corporation and Viad Corp,* named defendants below.

RULE 29.6 DISCLOSURE

Respondent Viad Corp does not have a parent corporation, and there is no publicly held company that owns ten percent or more of its stock.

---

* Although sued as "Viad Corporation," respondent's correct name is "Viad Corp".

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 DISCLOSURE ii

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. Statutory Background 2

B. Factual Background and Procedural History 7

ARGUMENT 10

A. The Court of Appeals Correctly Held that the BIA Preempts State Requirements Concerning the Design or Manufacture of Locomotives or Their Parts 11

B. Certiorari is Nonetheless Warranted Because Rulings from the Pennsylvania State Courts Directly Conflict with the Decision Below on This Recurring Issue of National Importance 22

C. This Case Presents the Most Appropriate Vehicle to Decide the Question Presented 25

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Altria Group, Inc. v. Good,
129 S. Ct. 538 (2008) 21

Angell v. Chesapeake & O. R.R. Co.,
618 F.2d 260 (4th Cir. 1980) 15

Atwell v. John Crane, Inc.,
986 A.2d 888 (Pa. Super. Ct. 2009) 10, 23, 25

Atwell v. John Crane, Inc.,
996 A.2d 490 (Pa. 2010) 10, 23

Brady v. Terminal R.R. Ass'n,
303 U.S. 10 (1938) 14

Buckman v. Plaintiffs' Legal Comm.,
531 U.S. 341 (2001) 13

CBOCS West, Inc. v. Humphries,
553 U.S. 442 (2008) 21

Cipollone v. Liggett Grp., Inc.,
505 U.S. 504 (1992) 13

Consol. Rail Corp. v. Pa. Pub. Util. Comm'n,
536 F. Supp. 653 (E.D. Pa. 1982) 12

Cook County v. United States ex rel. Chandler,
538 U.S. 119 (2003) 19

Darby v. A-Best Prods. Co.,
811 N.E. 2d 1117 (Ohio 2004) 12

Forrester v. Am. Dieselelectric, Inc.,
255 F.3d 1205 (9th Cir. 2001) 11

Geier v. Am. Honda Motor Co.,
529 U.S. 861 (2000) 13

Gen. Motors Corp. v. Kilgore,
853 So. 2d 171 (Ala. 2002) 12

TABLE OF AUTHORITIES
(continued)

Page(s)

Harris v. A.W. Chesterton, Inc.,
996 A.2d 562 (Pa. Super. Ct. 2010) 10, 23

Harris v. A.W. Chesterton, Inc.,
3 A.3d 671 (Pa. 2010) 10, 23

In re W. Va. Asbestos Litig.,
592 S.E.2d 818 (W. Va. 2003) 11, 12

Int'l Paper Co. v. Ouellette,
479 U.S. 481 (1987) 13

John Crane, Inc. v. Atwell,
131 S. Ct. 552 (2010) 10

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 21

Law v. Gen. Motors Corp.,
114 F.3d 908 (9th Cir. 1997) 11, 14

Marshall v. Burlington Northern, Inc.,
720 F.2d 1149 (9th Cir. 1983) 6, 18, 19

Mickelson v. Mont. Rail Link, Inc.,
999 P.2d 985 (Mont. 2000) 12

Napier v. Atl. Coast Line R.R. Co.,
272 U.S. 605 (1926) ..... passim

Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n,
413 A.2d 1037 (1980) 9

Norfolk S. Ry. Co. v. Shanklin,
529 U.S. 344 (2000) 13

Oglesby v. Del. & Hudson Ry. Co.,
180 F.3d 458 (2d Cir. 1999) 8, 11

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 21

TABLE OF AUTHORITIES
(continued)

Page(s)

Posadas v. Nat'l City Bank,
296 U.S. 497 (1936) 19

Riegel v. Medtronic, Inc.,
552 U.S. 312 (2008) 13

Rogers v. Missouri Pac. R.R.,
352 U.S. 500 (1957) 14

S. Pac. Transp. Co. v. Or. Pub. Util. Comm'n,
9 F.3d 807 (9th Cir. 1993) 14

San Diego Bldg. Trades Council v. Garmon,
359 U.S. 236 (1959) 13

Scheiding v. Gen. Motors Corp.,
993 P.2d 996 (Cal. 2000) 12

Southern Ry. Co. v. Lunsford,
297 U.S. 398 (1936) 3, 13

Springston v. Consol. Rail Corp.,
130 F.3d 241 (6th Cir. 1997) 12

Swift & Co. v. Wickham,
230 F. Supp. 398 (S.D.N.Y. 1964) 14

Terminal Railroad Ass'n of St. Louis v. Brotherhood of Railroad Trainmen,
318 U.S. 1 (1942) 16

United States v. Locke,
529 U.S. 89 (2000) 22

United Transp. Union v. Foster,
205 F.3d 851 (5th Cir. 2000) 11

Urie v. Thompson,
337 U.S. 163 (1949) 4, 9, 14, 16

Wright v. Ark. & Mo. R.R. Co.,
574 F.3d 612 (8th Cir. 2009) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Wyeth v. Levine,
129 S. Ct. 1187 (2009) 20, 21, 22

STATUTES

28 U.S.C. § 1441 8

29 U.S.C. § 653 17

45 U.S.C. § 51 14

49 U.S.C. § 20101 ..... 5, 18

49 U.S.C. § 20103 ..... 5, 6, 18

49 U.S.C. § 20106 ..... 6, 10, 18, 20

49 U.S.C. § 20301 15

49 U.S.C. § 20701 ..... 1, 3, 4, 7

49 U.S.C. § 20702 ..... 1, 4

49 U.S.C. § 20703 1

Department of Transportation Act,
Pub. L. No. 89-670, 80 Stat. 931
(1966) 3

Federal Railroad Safety Act,
Pub. L. No. 91-458,
84 Stat. 971 (1970) 5

Pub. L. No. 61-683, 36 Stat. 913 (1911) 3

Pub. L. No. 63-318, 38 Stat. 1192 (1915) 3

Pub. L. No. 68-277, 43 Stat. 659 (1924) 3

RULES AND REGULATIONS

49 C.F.R. § 221 (1978) 17

TABLE OF AUTHORITIES
(continued)

Page(s)

49 C.F.R. § 223.5 ..... 3, 16

49 C.F.R. § 232.407 15

Railroad Operational Safety & Health Standards; Termination, 43 Fed. Reg. 10,583 (Mar. 14, 1978) 18

Pa. R. Civ. P. 2179(a)(2) 24, 25

LEGISLATIVE MATERIALS

H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104 ..... passim

OTHER AUTHORITIES

U.S. Dep't of Transp., Report to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996) 6, 22

INTRODUCTION

The Boiler Inspection Act (BIA)—first enacted in 1911, amended in 1915 and 1924, and now codified at 49 U.S.C. § 20701 *et seq.*—delegated to the Interstate Commerce Commission (and now delegates to the Secretary of Transportation) responsibility to assure the safety of "the locomotive or tender and its parts and appurtenances." *Id.* § 20701; *see id.* §§ 20701-20703.

In 1926, this Court considered the question whether a state may regulate any aspect of "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," at least when there is no "conflict" between "the devices required by the State and those specifically prescribed by Congress or the Interstate Commerce Commission." *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 610-11 (1926). The Court's answer was unambiguous: "We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion." *Id.* at 613.

The court of appeals below, like every other federal court of appeals and every state court of last resort (save one) to have considered the question, followed *Napier*, and held that the BIA "preempts a broad field relating to the health and safety of railroad workers, including requirements governing the design and construction of locomotives, as well as equipment selection and installation." Pet. App. 11a.

The court of appeals' decision is correct. The petition for certiorari nevertheless should be granted,

so this Court can affirm the court of appeals' judgment and conclusively resolve a division in the lower courts over the preemptive effect of the BIA and the continued vitality of *Napier*. Although *Napier*'s preemption holding governs in most jurisdictions, the Pennsylvania Supreme Court has refused to follow it. This split in authority has created an untenable situation for manufacturers of locomotive equipment. As this case illustrates, even out-of-state plaintiffs with out-of-state injuries can and do sue in Pennsylvania invoking that state's relatively lenient venue and personal jurisdiction rules. Thus, manufacturers can now effectively be made subject to the laws of 50 different jurisdictions (applied by Pennsylvania state courts in actions brought there), with applicable safety standards changing every time a locomotive crosses state lines. That is precisely the type of disuniformity Congress sought to eradicate through the BIA.

STATEMENT OF THE CASE

A. Statutory Background

1. Before the enactment of the BIA, "Congress had, by the Safety Appliance Act and several amendments, itself made requirements concerning the equipment of locomotives used in interstate commerce." *Napier*, 272 U.S. at 608. The Safety Appliance Act did not "occupy the entire field of regulating locomotive equipment" because "its requirements are specific." *Id.* at 611.

In 1911, "Congress first conferred upon the Interstate Commerce Commission power in respect to locomotive equipment" by enacting the original BIA. Pub. L. No. 61-383, 36 Stat. 913. That delegation,

however, applied only to the locomotive's boiler. In 1915, Congress extended that delegation to "include the entire locomotive and tender and all parts and appurtenances thereof." Pub. L. No. 63-318, 38 Stat. 1192. The Act was again amended in 1924, Pub. L. No. 68-277, 43 Stat. 659, and remains unchanged in all relevant respects, except that regulatory authority was transferred from the Interstate Commerce Commission (ICC) to the Department of Transportation (DOT) in 1966. *See* Department of Transportation Act, Pub. L. No. 89-670, § 6(e), 80 Stat. 931, 939.

2. The BIA—also known as the Locomotive Inspection Act (LIA)—currently delegates to the Secretary of Transportation authority to assure through regulation and inspection the safety of "the locomotive or tender and its parts and appurtenances." 49 U.S.C. § 20701. The Act applies to "[w]hatever in fact is an *integral or essential part of a completed locomotive*," as well as "all parts or attachments definitely prescribed by lawful order" of the DOT. *S. Ry. Co. v. Lunsford*, 297 U.S. 398, 402 (1936) (emphasis added).[1]

The statute provides that a "railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances ... [1] are in proper condition and safe to operate without unnecessary danger of personal injury; ... [2] have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under

---

[1] A "locomotive" is "a self-propelled unit of equipment designed *primarily for moving other equipment*," not including "self-propelled passenger cars." 49 C.F.R. § 223.5.

this chapter; and ... [3] can withstand every test prescribed by the Secretary under this chapter." 49 U.S.C. § 20701. The Act broadly delegates to the Secretary authority to promulgate regulations concerning the safety of locomotives and locomotive equipment, and to assure compliance with those regulations. *Id.* §§ 20701-20702. The Secretary's authority under the BIA is not "confined to safeguarding against accidental injury," but also extends to "protection of employee health." *Urie v. Thompson*, 337 U.S. 163, 191, 193-94 (1949).

3. This Court addressed the BIA's preemptive scope in 1926 in *Napier*. Georgia and Wisconsin had attempted to impose their own particular requirements on the design of locomotives and their parts. 272 U.S. at 607. "The main question" presented was "one of statutory construction"—"whether the Boiler Inspection Act has occupied the field of regulating locomotive equipment used on a highway of interstate commerce." *Id.*

In answering that question, this Court "assumed" each state requirement "to be a proper exercise of its police power," and further "assumed ... there is no physical conflict between the devices required by the State and those specifically prescribed by Congress or the Interstate Commerce Commission; and that the interference with commerce resulting from the state legislation would be incidental only." *Id.* at 610-11 (footnote omitted).

The Court nevertheless found Congress's intention to preempt the state legislation "clearly manifested" (*id.* at 611) in the text, structure, and purpose of the BIA. The "power delegated to the Com-

mission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 613. Moreover, the fact that ICC regulations were not "inconsistent with the state legislation" made no difference, because the "fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power." *Id.*

The Court concluded that the BIA "was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose." *Id.* at 613.

4. In 1970, Congress enacted the Federal Railroad Safety Act (FRSA), Pub. L. No. 91-458, 84 Stat. 971. The FRSA was enacted "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Congress found that while the then-existing laws concerning railroad safety—including the BIA—"have served well" and should be "continue[d] ... without change," those laws "meet only certain and special types of railroad safety hazards." H.R. Rep. No. 91-1194, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4105. Congress therefore expanded federal authority to all areas of rail safety, delegating to the Secretary of Transportation the authority to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." 49 U.S.C.

§ 20103(a). The FRSA did not, however, "subsume, replace, or recodify any acts," including the BIA. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983) (Kennedy, J.).

Congress also included in the FRSA a specific preemption provision, which was meant to assure that "[e]xisting state rail safety statutes and regulations remain in force until and unless preempted by federal regulation." H.R. Rep. No. 91-1194, at 24, *reprinted in* 1970 U.S.C.C.A.N. at 4130. The provision states in part that a "State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation ... prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). The same section provides that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." *Id.* § 20106(a)(1).

6. In 1996, the Federal Railroad Administration (FRA)—the agency within DOT responsible for regulating railroad safety—reported the results of an investigation into the question of asbestos in locomotives and their parts. That report, which was ordered by Congress in 1992, determined that "further action with respect to the presence of asbestos in locomotive cabs" was not "warranted at this time." U.S. Dep't of Transp., Report to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996), at 10-12, *available at* http://www.regulations.gov/contentStreamer?objectId=09000064802be673&disposition=attachment&contentType=pdf.

B. Factual Background and Procedural History

1. Between 1947 and 1974, George M. Corson was employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad, and worked at various locomotive repair facilities in South Dakota and Montana. His duties included "removing insulation from locomotive boilers and putting brake shoes on locomotives." Pet. App. 3a. Corson allegedly contracted mesothelioma from his exposure to asbestos from the insulation and brake shoes. Viad is alleged to be the successor in interest of the company that allegedly manufactured the locomotives and boilers, while Railroad Friction Products Corporation (RFPC), the other respondent here, allegedly distributed the brake shoes (i.e., "parts and appurtenances" of the locomotive itself, 49 U.S.C. § 20701).

2. On June 13, 2007, Corson and his wife, Freida E. Jung Corson, filed a complaint against numerous defendants in the Court of Common Pleas of Philadelphia County, alleging state-law tort claims. Corson passed away during the pendency of the litigation, and the personal representatives of his Estate, Gloria Kurns and Freida Corson, were substituted as party plaintiffs and are the petitioners here.

Many of the defendants, including respondents Viad and RFPC, moved for summary judgment on various grounds. Viad's motion argued that Corson's state common-law claims were preempted by the BIA. The Common Pleas court denied Viad's and RFPC's summary judgment motions in a one-sentence order, although it granted summary judg-

ment as to several other defendants on other grounds.

3. On May 13, 2008, following the grants of summary judgment to some defendants and Corson's voluntary dismissal of others—including a Pennsylvania corporation whose presence in the case had precluded removal to federal court on the basis of diversity of citizenship, *see* 28 U.S.C. § 1441(b)—Viad and RFPC timely removed the remainder of the case to the United States District Court for the Eastern District of Pennsylvania. Viad and RFPC again moved for summary judgment on preemption grounds.

4. The district court granted the motion for summary judgment, citing *Napier*, *see* Pet. App. 25a-34a, and the Third Circuit affirmed. The court of appeals began with *Napier*, and its "hold[ing] that state legislation is precluded, because *the Boiler Inspection Act, as we construe it, was intended to occupy the field*. The broad scope of the authority conferred upon the Commission leads to that conclusion." Pet. App. 10a (quoting 272 U.S. at 613) (quotation omitted).

The "goal of the LIA," the court further explained, "is to 'prevent the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them.'" Pet. App. 12a (quoting *Oglesby v. Del. & Hudson Ry. Co.*, 180 F.3d 458, 461 (2d Cir. 1999)). "In order to accomplish this goal, suits against manufacturers of locomotive parts for product liability claims should be included in the scope of the LIA's field preemption, particularly because the

LIA governs both the design and the construction of a locomotive's parts." Pet. App. 13a. "If each state had its own standards for liability for railroad manufacturers," the court emphasized, "equipment would have to be designed so that it could be changed to fit these standards as the trains crossed state lines, or adhere to the standard of the most restrictive states." Pet. App. 13a-14a. "Congress's goal of uniform railroad equipment regulation would clearly be impeded by state product liability suits against manufacturers, the purpose of which is, in part, to persuade defendants to comply with a standard of care established by the state." Pet. App. 14a.

The court of appeals therefore "agree[d] with the vast majority of courts that have been called upon to decide the issue of the scope of LIA preemption," Pet. App. 16a, holding that the BIA "preempts a broad field relating to the health and safety of railroad workers, including requirements governing the design and construction of locomotives, as well as equipment selection and installation." Pet. App. 11a (citing *Napier*, 272 U.S. at 611-12; *Urie*, 337 U.S. at 191-93).

The court of appeals rejected plaintiffs' reliance on the Pennsylvania Supreme Court's opinion in *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (1980), the only appellate court to hold that the BIA does not preempt the field of locomotive equipment safety. In particular, the court rejected the Pennsylvania court's view that the FRSA undermined this Court's field-preemption holding in *Napier*. Noting that the FRSA provides that "'[l]aws, regulations, and orders related to railroad safety ... shall be nationally uniform to the extent practica-

ble,'" the court held that "Congress did not intend [the FRSA] to disturb the existing framework of federal preemption of the railroad industry established by the LIA." Pet. App. 20a (quoting 49 U.S.C. § 20106(a)) (first alteration and omission in original).

5. While this case was pending in the court of appeals, an intermediate Pennsylvania appellate court held in two cases that the BIA does not preempt the field of locomotive equipment safety. *Atwell v. John Crane, Inc.*, 986 A.2d 888 (Pa. Super. Ct. 2009); *see also Harris v. A.W. Chesterton, Inc.*, 996 A.2d 562 (Pa. Super. Ct. 2010) (relying on *Atwell*). The Pennsylvania Supreme Court denied review. *See Atwell v. John Crane, Inc.*, 996 A.2d 490 (Pa. 2010) (pet. for cert. filed, No. 10-272, August 26, 2010); *Harris v. A.W. Chesterton, Inc.*, 3 A.3d 671 (Pa. 2010) (pet. for cert. filed, No. 10-520, October 19, 2010). The defendants in both cases have petitioned this Court for certiorari. The Court called for the views of the Acting Solicitor General in *John Crane, Inc. v. Atwell*, 131 S. Ct. 552 (2010) (No. 10-272). The Court has not acted on the petition in *Griffin Wheel Co. v. Harris*, No. 10-520, which was distributed for the Conference of December 10, 2010.

ARGUMENT

The court of appeals correctly concluded that petitioners' tort claims are preempted by the BIA, and correctly adhered to this Court's decision in *Napier*. This Court should grant certiorari and affirm that judgment. The holding below is supported not only by *Napier*, but by an "avalanche of ... authority from other jurisdictions, both state and federal." *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818, 822 (W. Va.

2003). The contrary view adopted by the Pennsylvania courts, however, has created an untenable situation for locomotive equipment manufacturers, which now can be forced to defend themselves in Pennsylvania courts under safety standards that vary throughout the Nation. Viad therefore agrees with petitioners that review of the question presented by this case is warranted. Viad also agrees with petitioners (Pet. 3 n.4) that of the three petitions for certiorari currently pending before the Court, this case is the best vehicle through which to consider the question presented.

A. The Court of Appeals Correctly Held that the BIA Preempts State Requirements Concerning the Design or Manufacture of Locomotives or Their Parts

1. "It has long been settled that Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment." *Law v. Gen. Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997). Thus, like the court of appeals, every appellate court—other than the Pennsylvania courts—to have considered the question has held that the BIA preempts the field of safety regulation of locomotives and their parts, including claims arising out of exposure to asbestos found in locomotive parts. *See Forrester v. Am. Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001) (BIA preempts non-employee product liability actions against manufacturer of locomotive cranes); *United Transp. Union v. Foster*, 205 F.3d 851 (5th Cir. 2000) (BIA preempts statute requiring engine be equipped with signal devices); *Oglesby v. Del. &*

Hudson Ry. Co., 180 F.3d 458 (2d Cir. 1999) (common-law failure to warn claim against manufacturer of seats is preempted by the BIA); *Springston v. Consol. Rail Corp.*, 130 F.3d 241 (6th Cir. 1997) (common-law negligence claim for lack of visual devices on a train brought against owner of train and its manufacturer is preempted by the LIA); *Darby v. A-Best Prods. Co.*, 811 N.E. 2d 1117, 1125-26 (Ohio 2004) (finding that the BIA "preempts state-law tort claims against the manufacturers of railroad locomotives asserting injury caused by exposure to asbestos contained in railroad locomotives"); *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818 (W. Va. 2003) (BIA preempts state tort law claims against manufacturers of locomotives and asbestos-containing parts and components thereof); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171 (Ala. 2002) (BIA preempts claims against manufacturer for use of asbestos in locomotive parts and failure to warn); *Mickelson v. Mont. Rail Link, Inc.*, 999 P.2d 985 (Mont. 2000) (BIA preempts common-law claims against railroad concerning locomotive equipment); *Scheiding v. Gen. Motors Corp.*, 993 P.2d 996 (Cal. 2000) (BIA preempts railroad workers' design defect and failure to warn claims against manufacturer for asbestos-related injuries); *see also Consol. Rail Corp. v. Pa. Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983).

This "avalanche of ... authority," *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 822, is hardly surprising. It follows directly from this Court's unambiguous holding in *Napier* that "the Boiler Inspection Act ... was intended to occupy the field" of regulation concerning the "design, the construction, and the mate-

rial of every part of the locomotive and tender and of all appurtenances," irrespective of whether any federal safety standard is "inconsistent with the state legislation." 272 U.S. at 611, 613; *see also S. Ry. Co.*, 297 U.S. at 402.[3]

The reason for broad field preemption in this area is clear. It "is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances, with most railroad routes wending through interstate commerce. The virtue of uniform national regulation 'is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state.'" *Law*,

---

[3] Petitioners appear to contend that *Napier*'s mention of "state *legislation*" means that state common-law tort rules do not fall within the BIA's preemptive scope. Pet. 15-16. *Napier* mentioned "state legislation" because state legislation was at issue there. The argument that the BIA should be read to preempt only a state's statutory and regulatory requirements, and not its common-law requirements, is unavailing. As this Court has repeatedly explained, state "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959); *see, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008); *Buckman v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868-69, 872 (2000); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 358 (2000); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521-23 (1992); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987). State tort claims thus interfere with the federal scheme just as surely as state legislation does, and they are preempted for the same reason.

114 F.3d at 910 (quoting *S. Pac. Transp. Co. v. Or. Pub. Util. Comm'n*, 9 F.3d 807, 811 (9th Cir. 1993)). Indeed, "[i]f each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined." *Id.* at 910-11. *See also Swift & Co. v. Wickham*, 230 F. Supp. 398, 407-08 (S.D.N.Y. 1964) (Friendly, J.) (three-judge court) (*Napier's* "decision as to the exclusivity of the Boiler Inspection Act must have been influenced by the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them").[3]

---

[3] Even though state common-law claims concerning the design and manufacture of locomotive equipment are preempted, railroad workers injured on the job are not necessarily left without a remedy. *See Law*, 114 F.3d at 911-12. The Federal Employers' Liability Act (FELA) permits an injured railroad worker to recover compensatory damages from his employer (i.e., the railroad, not the locomotive equipment manufacturer) when the employer's "negligence played any part, even the slightest, in producing the injury." *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 506 (1957); *see* 45 U.S.C. § 51 *et seq.* And a worker can establish negligence per se under FELA by establishing a violation of the BIA or other rail safety statute. *Urie*, 337 U.S. at 189. It is true that negligence per se applies only to injuries suffered while the train was "in use," *see, e.g., Brady v. Terminal R.R. Ass'n*, 303 U.S. 10, 11-12 (1938), and thus would not cover injuries (like Corson's) suffered while a train was in the repair shop. Pet. 24-25. But those injuries still could be remedied in a simple negligence action under FELA—the plaintiff would lose only the benefit of the special negligence per se theory. *See, e.g., Wright v. Ark. & Mo. R.R. Co.*, 574 F.3d 612, 614 (8th Cir. 2009).

2. Despite this Court's clear precedent, the overwhelming weight of precedent in the state and federal courts, and the undeniable need for uniformity in the area of locomotive equipment, petitioners—and the Pennsylvania courts—argue that their state common-law claims alleging injuries allegedly sustained from the design or manufacture of locomotive parts may proceed. Petitioners' arguments are without merit.

a. Petitioners argue that this Court's subsequent precedents narrowed *Napier*, but those cases construed not the BIA, but the Safety Appliance Act (SAA), 49 U.S.C. § 20301 *et seq.*, which grants federal regulatory authority over specific aspects of the rail car and locomotive.[4] Pet. 16-21. The SAA precedents are inapposite. While the SAA grants federal regulatory authority over specific aspects of the rail car and locomotive, the BIA delegates to the Secre-

---

Petitioners cite a string of FELA cases ostensibly showing that the BIA does not "appl[y]" to repair-shop-type claims (like Corson's) and thus cannot preempt such claims. Pet. 25. Those cases have nothing to do with preemption of state law. They address the question *under FELA* of "at what point the railway becomes absolutely liable for injuries caused by defective equipment under the Act." *Angell v. Chesapeake & Ohio R.R. Co.*, 618 F.2d 260, 262 (4th Cir. 1980). The answer under FELA—i.e., when the trains are "in use" such that a violation of the BIA (or other federal railroad safety laws) establishes negligence per se in a FELA action—is irrelevant to the question whether the BIA's delegation of federal authority to regulate locomotive equipment design and manufacture preempts state-law claims that seek to regulate the same field.

[4] Rail cars are distinct from locomotives. *See, e.g.*, 49 C.F.R. § 232.407(a)(2) (defining "[t]rain" generally to mean "one or more locomotives coupled with one or more rail cars").

tary authority over the entire locomotive and its parts and appurtenances. There is no dispute that this case falls within the BIA's scope. And while petitioners treat the SAA and BIA as one—referring to them as the "railroad safety acts," *see, e.g.*, Pet. i—this Court has already held that their preemptive scope is not the same. As *Napier* itself explained, the SAA does not "occupy the entire field of regulating locomotive equipment" because, in contrast to the BIA, "its requirements are specific." 272 U.S. at 611.

Petitioners cite no cases *under the BIA* undermining the preemption rule enunciated in *Napier*. There are none. To the contrary, this Court expressly *reaffirmed* the holding of *Napier* more than 20 years later. *See Urie*, 337 U.S. at 192.[5]

This conflation of the two Acts leads petitioners not only to rely on the wrong precedent, but more broadly to misconceive the legal question implicated in this case. Respondents did not seek summary judgment on the basis of the SAA, and the court of appeals did not consider that question below. Thus,

---

[5] Petitioners—like the Pennsylvania Supreme Court in *Norfolk & Western*—rely on *Terminal Railroad Ass'n v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1942), as having narrowed *Napier*, Pet. 36 n.13, but that case is inapposite. *Trainmen*, which did not cite *Napier*, concerned whether a railroad must supply its employees with cabooses to ride in. 318 U.S. at 2-3. A caboose is "a car in a freight train intended to provide transportation for crewmembers," 49 C.F.R. § 223.5—not a locomotive—and the case did not involve the "design, the construction, [or] the material of [a] part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611. And *Urie* reaffirmed *Napier*'s holding seven years after *Trainmen*.

the question here is not whether petitioners' tort claims are preempted by "the federal railroad safety acts," as their question presented states (Pet. i), but whether those claims are preempted *by the BIA in particular*. And contrary to petitioners' suggestion, respondents do not argue (and have never argued) that the BIA precludes "all state regulation of railroad safety." Pet. 19. Respondents only argue (and the court below only held) that the BIA preempts state law concerning the "design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," per *Napier*. 272 U.S. at 611.[6]

---

[6] Petitioners place significance on the FRA's 1978 statement that the Occupational Safety and Health Administration (OSHA) should take a lead role in regulating many aspects of "railroad occupational safety and health." 49 C.F.R. § 221 (1978). Petitioners appear to take this statement to mean that this case should be governed by OSHA's organic statute, which contains a savings clause. *See* 29 U.S.C. § 653(b)(4). But petitioners do not and could not argue that this case falls outside the bounds of the BIA, *viz.*, the "design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," *Napier*, 272 U.S. at 611, and there is no plausible argument that OSHA's savings clause was intended to impliedly repeal the BIA's preemptive scope. Further, the FRA's statement concerning OSHA's responsibilities specifically emphasized that FRA would retain responsibility over "hazardous working conditions in those traditional areas of railroad operations in which we have special competence." 49 C.F.R. § 221 (1978). And the preamble accompanying the regulation explicitly reaffirmed that it is FRA—not OSHA—that retains primary jurisdiction over "the design of locomotives and other rolling equipment used on a railroad, since working conditions related to such surfaces are regulated by FRA as major aspects of railroad operations." Railroad Operational Safety &

b. Petitioners also argue that the saving clause in the preemption provision of FRSA, enacted in 1970, overrides BIA preemption and preserves all state-law claims in the absence of a directly conflicting federal regulation. Pet. 26-33. The FRSA provision states that a "State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation ... prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). That provision has no bearing the scope of preexisting BIA preemption.

Before 1970, federal regulation of railroad safety was not plenary, but was limited to "certain and special types of railroad safety hazards," like locomotive equipment (BIA) and rail car (SAA) safety. H.R. Rep. No. 91-1194, at 2, *reprinted in* 1970 U.S.C.C.A.N. at 4105. Congress enacted the FRSA to "promote safety in *every* area of railroad operations." 49 U.S.C. § 20101 (emphasis added). Accordingly, Congress delegated to the Secretary of Transportation the authority to "prescribe regulations and issue orders for every area of railroad safety *supplementing laws* and regulations"—like the BIA—"in effect on October 16, 1970." 49 U.S.C. § 20103(a) (emphasis added).

As the statute makes clear, the FRSA was meant to supplement the BIA and other then-existing statutes, not to alter or amend such statutes. Indeed, as then-Judge Kennedy explained, the FRSA did "not subsume, replace, or recodify any acts." *Marshall v.*

Health Standards; Termination, 43 Fed. Reg. 10,583, 10,587 (Mar. 14, 1978).

Burlington Northern, Inc., 720 F.2d 1149, 1153 (9th Cir. 1983). To the contrary, Congress believed that then-existing laws like the BIA "have served well" and should be "continue[d] ... without change." H.R. Rep. No. 91-1194, at 2, *reprinted in* 1970 U.S.C.C.A.N. at 4105. "The logical inference from this structure is that Congress intended to leave unchanged the force and effect of existing federal regulatory statutes." *Marshall*, 720 F.2d at 1153. The FRSA's preemption provision thus allows states to continue to regulate in areas where states have always regulated until the federal government says otherwise, but has no effect on areas previously preempted by federal law, like regulation of locomotive equipment.[7]

Petitioners' contrary reading would violate the "cardinal rule ... that repeals by implication are disfavored." *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)) (quotation omitted; omission in original). And it would undermine the FRSA's express command that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent prac-

---

[7] *Marshall*'s analysis is supported by the FRSA's legislative history. The preemption provision was meant to assure that "*[e]xisting* state rail safety statutes and regulations remain in force until and unless preempted by federal regulation." H.R. Rep. No. 91-1194, at 24, *reprinted in* 1970 U.S.C.C.A.N. at 4130 (emphasis added). But there were no "existing" state rules "in force" concerning the design and manufacture of locomotives and their parts in 1970, because this Court had held the BIA to have preempted that entire field in *Napier*.

ticable." *Id.* § 20106(a)(1); *see also* H.R. Rep. No. 91-1194, at 12, *reprinted in* 1970 U.S.C.C.A.N. at 4116 ("[I]t is the policy of Congress that rail safety regulations be nationally uniform to the extent practicable"). Granting federal regulatory authority over areas of railroad safety previously outside the bounds of federal authority went a long way toward accomplishing that goal compared to what came before, even though some interstitial state regulation would remain. But allowing states to regulate in an area where they had *not* regulated before—like the design and manufacture of the locomotive and its parts—would undermine rather than further the purpose of federal uniformity.[8]

c. Finally, petitioners urge this Court to "abandon[] the doctrine of implied federal field preemption," Pet. 36, and instead apply the conflict preemption principles set forth in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). This Court should decline petitioners' invitation.

---

[8] Petitioners also rely on a later-enacted portion of the preemption provision, 49 U.S.C. § 20106(b)(1), which states that "[n]othing in this section be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party" "has failed to comply with" a federal standard, "its own plan, rule, or standard that it created pursuant to" an order of a federal regulator, or "with a State law, regulation, or order that is not" preempted under subsection (a). But that provision does not apply to "causes of action arising from events or activities occurring [before] January 18, 2002," *id.* § 20106(b)(2), far after the relevant events in this case are alleged to have taken place. And petitioners' claims do not allege that respondents violated any federal standard or any state "law, regulation, or order." They instead assert that respondents violated state common-law requirements.

To begin, nothing in *Wyeth* undermines this Court's long-standing view that "[p]re-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008). *Wyeth* was purely a conflict preemption case, *see* 129 S. Ct. at 1194, as the defendant had abandoned its field preemption argument before the lower court, *id.* at 1192, and did not call into question the long-recognized doctrine of field preemption.

Petitioners' call to abandon *Napier* is particularly unsound because that decision "is one of statutory construction," 272 U.S. at 607, and "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done.'" *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). Congress has not altered the BIA in any relevant way since *Napier* was decided in 1926. And even if *Wyeth* did "represent a turn in the course of the law" of field preemption, *id.* at 138—which it did not—this Court has repeatedly rejected abandoning its statutory interpretation precedent, irrespective of whether it would decide the case the same way today. *See, e.g., id.* at 138-39; *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008).[9]

---

[9] Even if the conflict-preemption principles of *Wyeth* did apply here, the judgment of the court of appeals should be affirmed. First, *Wyeth* relied in large part on the presumption against preemption. 129 S. Ct. at 1194-95. But that presumption does not apply where, as here, the field historically has

In sum, the court of appeals correctly found that the BIA preempts the field of locomotive equipment regulation, as this Court held in *Napier*.

B. Certiorari is Nonetheless Warranted Because Rulings from the Pennsylvania State Courts Directly Conflict with the Decision Below on This Recurring Issue of National Importance

1. Contrary to the "avalanche" of federal and state court precedent discussed above, the Pennsylvania Superior Court—an intermediate state appellate tribunal—recently held in two cases that state

---

been dominated by federal rather than state regulation. *See United States v. Locke*, 529 U.S. 89, 99 (2000). State regulation of locomotive equipment has been wholly preempted since *Napier* was decided in 1926. And Congress's refusal to amend the BIA in the more than eight decades since *Napier* suffices to manifest its intent to preempt state regulation of locomotive equipment.

Further, there is "clear evidence," *Wyeth*, 129 S. Ct. at 1198, that allowing state tort claims based on asbestos exposure would conflict with the federal regulatory scheme. In particular, contrary to petitioners' assertion that "the FRA has never addressed asbestos," Pet. 34, the FRA expressly decided *not* to regulate asbestos in locomotives. In a September 1996 Report to Congress—mandated by Congress four years earlier—the FRA found unequivocally that "further action with respect to the presence of asbestos in locomotive cabs" was not "warranted at this time." U.S. Dep't of Transp., Report to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996), at 10-12, *available at* http://www.regulations.gov/contentStreamer?objectId=09000064802be673&disposition=attachment&contentType=pdf. Thus, even if petitioners were correct and *Napier*'s overall field-preemption holding is no longer good law, petitioners' asbestos-related claims would still be preempted.

tort law claims of railroad workers are not preempted by the BIA. In *Atwell v. John Crane, Inc.*, 986 A.2d 888 (Pa. Super. Ct. 2009), the Pennsylvania Superior Court rejected BIA preemption of state common-law claims, following the Pennsylvania Supreme Court's 1980 decision in *Norfolk & Western* that the BIA did not preempt the field of the design and manufacture of locomotives and their parts. The reasoning in *Atwell* was subsequently adopted *in toto* by *Harris v. A.W. Chesterton, Inc.*, 996 A.2d 562 (Pa. Super. Ct. 2010).

Despite the urging of the Superior Court,[10] the Supreme Court of Pennsylvania declined to hear appeals in both cases. *Atwell*, 996 A.2d 490; *Harris*, 3 A.3d 671. As a result, and despite more than two dozen appellate decisions from other jurisdictions since *Norfolk & Western* that have found BIA field preemption in the circumstances here presented, the Pennsylvania state courts will continue to follow that decision unless constrained by this Court.

This division in authority is intolerable. Railroads and locomotive equipment manufacturers will be subject not only to Pennsylvania standards, but also to the standards of any other state whose law might apply in an action brought in a Pennsylvania

---

[10] *See Atwell*, 986 A.2d at 894 n.9 ("The decision as to whether the legal rights and remedies related to railroad workshops are or are not preempted resides more appropriately in our Supreme Court to whose attention we strongly recommend it.").

court.[11] That is precisely the result Congress wished to avoid when it enacted the BIA.

2. The issues raised by this petition are both pressing and recurring, as the large number of courts to have already considered the question presented demonstrates. Indeed, hundreds of cases involving similar issues are pending in the Multi-District Asbestos Litigation Part for the Eastern District of Pennsylvania.

This backlog of cases is likely to grow in the future, as the conflict created by the Pennsylvania state courts encourages plaintiffs to forum-shop their claims into the Pennsylvania courts. Plaintiffs certainly will do their utmost to find a basis for commencing their cases in Pennsylvania state court and for immunizing their pleadings from removal. Under Pennsylvania law, a plaintiff may bring an asbestos-related tort claim in the state's courts, even if no part of the claim arose in the state, so long as the defendant "regularly conducts business" in the county in which the suit is filed. Pa. R. Civ. P. 2179(a)(2) (governing venue for claims against corporations). And because Pennsylvania is a hub for the railroad industry, most railroad operators and locomotive parts manufacturers regularly conduct business in the state. As a result, a disproportionate number of future claims are likely to be brought in Pennsylvania and allowed to proceed because of that

---

[11] The question whether the BIA preempts state law is itself a question of federal law, not state law, and Pennsylvania courts will therefore continue to apply their view of federal preemption, even if another state's substantive law applies as the rule of decision.

state's courts' anomalous and incorrect interpretation of the BIA's preemptive scope.

C. This Case Presents the Most Appropriate Vehicle to Decide the Question Presented

Of the three petitions under consideration for review by this Court, this one provides the best vehicle for resolution of this important issue. Counsel for the petitioners here, who also represents the respondents in *Atwell* and *Harris*, agrees that "the issue is better presented in the instant case." Pet. 3 n.4.

The petition here presents the question of BIA preemption in a clean factual and legal context. Viad's alleged predecessor in interest manufactured the locomotive itself and its boilers—the very equipment at the heartland of the BIA. The defendants in *Atwell* and *Harris* supplied only gaskets and brake shoes, which could raise factual questions about application of the BIA. The *Atwell* trial court, in fact, found that the parts at issue there are not "appurtenances" of a locomotive under the BIA. *Atwell*, 986 A.2d at 892. And the *Harris* petitioners added the preemptive scope of the SAA to their question presented (*Griffin Wheel Co. v. Harris*, No. 10-520, Pet. for Cert. at i), potentially diluting the focus on BIA preemption and the continued vitality of *Napier*.

Further, the *Atwell* opinion issued by the Pennsylvania Superior Court rests almost entirely on the precedential effect of *Norfolk & Western*, a three-decade old Pennsylvania state court decision that predates and is inconsistent with the settled law of all other jurisdictions, and includes little independent analysis of current case law. And there is no

opinion in *Harris*, merely a citation to *Atwell*. The Third Circuit's opinion in this case, by contrast, reflects a comprehensive and careful analysis of the issues—a much better framework for evaluating the question common to all three cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment should be affirmed.

Respectfully submitted,

DANIEL MARKEWICH
ELLEN G. MARGOLIS
AMY KALLAL
MOUND COTTON WOLLAN
& GREENGRASS
One Battery Park Plaza
New York, New York 10004
(212) 804-4200

WALTER DELLINGER
JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
ANTON METLITSKY
JOANNA NAIRN*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
*Admitted in Massachusetts only

March 9, 2011

JOINT APPENDIX

AUG 12 2011

No. 10-879

IN THE

Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, WIDOW IN HER OWN RIGHT,
Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

WALTER DELLINGER
JONATHAN D. HACKER
Counsel of Record
ANTON METLITSKY
JOANNA NAIRN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
(jhacker@omm.com)
Counsel for Respondent Viad Corp

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)
Counsel for Petitioners

August 12, 2011

(Additional Counsel Listed On Inside Cover)

PETITION FOR A WRIT OF CERTIORARI FILED: JANUARY 3, 2011
CERTIORARI GRANTED: JUNE 6, 2011

Library of Congress
Law Library

DANIEL MARKEWICH
ELLEN G. MARGOLIS
AMY KALLAL
MOUND COTTON WOLLAN
& GREENGRASS
One Battery Park Plaza
New York, NY 10004
(212) 804-4200
Counsel for Respondent
Viad Corp

JAMES C. MARTIN
Counsel of Record
JOHN L. VITSAS
COURTNEY C. T. HORRIGAN
DAVID J. BIRD
ROBERT H. OWEN
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3131
Counsel for Respondent
Railroad Friction Products
Corporation

RICHARD P. MYERS
ROBERT E. PAUL
PAUL, REICH & MYERS,
P.C.
1608 Walnut Street
Suite 500
Philadelphia, PA 19103
(215) 735-9200
Counsel for Petitioners

TABLE OF CONTENTS

Page

Relevant Docket Entries:

Philadelphia County Court of Common Pleas, *Corson, et al. v. A.W. Chesterton Inc., et al.*, No. 070601384 1

United States District Court for the Eastern District of Pennsylvania, *Kurns, etc., et al. v. A.W. Chesterton Inc., et al.*, No. 2:08-cv-02216-MSG 8

United States Court of Appeals for the Third Circuit, *Kurns, etc., et al. v. A.W. Chesterton Inc., et al.*, No. 09-1634 13

Plaintiffs' General Master Long-Form Complaint, *In re Asbestos Litigation in Philadelphia Court of Common Pleas*, No. 8610-0001 (Phil. Cty. Ct. Common Pleas filed Oct. 7, 1986) (excerpts) 18

Complaint – Civil Action Asbestos, *Corson, et al. v. A.W. Chesterton, Inc., et al.*, No. 070601384 (Phil. Cty. Ct. Common Pleas filed June 13, 2007) 41

Transcript of (Discovery) Deposition of George M. Corson, *Corson, et al. v. A.W. Chesterton, Inc., et al.*, No. 1384 (Phil. Cty. Ct. Common Pleas Aug. 22, 2007) (excerpts) 54

Transcript of (Phase I) Deposition of George M. Corson, *Corson, et al. v. A.W. Chesterton, Inc., et al.*, No. 1384 (Phil. Cty. Ct. Common Pleas Aug. 22, 2007) (excerpts) 72

Transcript of Oral Deposition of Terry Corson, *Kurns, etc., et al. v. A.W. Chesterton, Inc., et al.*, No. 1384 (Phil. Cty. Ct. Common Pleas Mar. 3, 2008) (excerpts) 79

Transcript of Videotaped Deposition of Terry Corson, *Kurns, etc., et al. v. A.W. Chesterton, Inc., et al.*, No. 1384 (Phil. Cty. Ct. Common Pleas Mar. 3, 2008) (excerpts) 86

Plaintiffs' Counter-Reply to Viad's Reply in Response to Plaintiffs' Opposition to Motion for Summary Judgment, *Corson, et al. v. VIAD*, No. 0706-1384, Control No. 30884 (Phil. Cty. Ct. Common Pleas filed Apr. 22, 2008) 95

Exhibit B (excerpt from George H. Drury, *Guide to North American Steam Locomotives: History and development of steam power since 1900* (1993)) 96

Order Granting Soo Line Railroad et al.'s Motion for Summary Judgment, *Corson, et al. v. Soo Line Railraod, et al.*, No. 001384 (Phil. Cty. Ct. Common Pleas May 8, 2008) 99

Order Denying Railroad Friction's Motion for Summary Judgment, *Corson, et al. v. A.W. Chesterton, Inc., et al.*, No. 0706-1384 (Phil. Cty. Ct. Common Pleas May 13, 2008) 100

Order Denying VIAD's Motion for Summary Judgment, *Kurns, etc., et al. v. A.W. Chesterton, Inc., et al.*, No. 0706-1384 (Phil. Cty. Ct. Common Pleas May 13, 2008) 101

Viad Corp's Motion for Summary Judgment, *Kurns, etc., et al. v. Railroad Friction Prods. Corp., et al.*, MDL Docket No. 875, Case No. 2:08-CV-2216 (E.D. Pa. filed Sept. 16, 2008) 102

Answer to Viad's Motion for Summary Judgment, *Kurns, etc., et al. v. A.W. Chesterton, Inc., et al.*, Civil Action No. 08-CV-2216 (E.D. Pa. filed Sept. 29, 2008) 107

Opinion Affirming Orders Granting Summary Judgment, *Kurns, etc., et al. v. Airco Welders Supply, Inc., et al.*, No. 01384 (Phil. Cty. Ct. Common Pleas 1st Judicial Dist. Oct. 9, 2008)..... 108

Motion for Summary Judgment of Railroad Friction Products Corp., *Kurns, etc., et al. v. Railroad Friction Prods. Corp., et al.*, MDL Docket No. 875, Civil Action No. 2:08-CV-2216 (E.D. Pa. filed Oct. 27, 2008)..... 119

Answers to Motion for Summary Judgment of Railroad Friction Products, *Kurns, etc., et al. v. A.W. Chesterton, Inc., et al.*, Civil Action No. 08-CV-2216 (E.D. Pa. filed Nov. 12, 2008)..... 122

Order Granting Petition for a Writ of Certiorari, *Kurns, etc., et al. v. Railroad Friction Prods. Corp., et al.*, No. 10-879 (U.S. June 6, 2011)..... 123

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY, PENNSYLVANIA

No. 070601384

GEORGE M. CORSON, ET AL.,
Plaintiffs,

v.

A.W. CHESTERTON INC., ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
13-JUN-2007	CIVIJ – COMMENCEMENT CIVIL ACTION JURY
13-JUN-2007	CMPLT – COMPLAINT FILED NOTICE GIVEN
	COMPLAINT WITH NOTICE TO DEFEND WITHIN TWENTY (20) DAYS AFTER SERVICE IN ACCORDANCE WITH RULE 1018.1 FILED.
	* * * * *
13-JUL-2007	ENAJD – ENTRY OF APPEAR/ JURY DEMAND
	ENTRY OF APPEARANCE OF MARK A LOCKETT FILED ON BEHALF OF DFT RAILROAD

FRICTION PRODUCTS CORP. A SHORT FORM ANSWER WITH ALL AFFIRMATIVE DEFENSES IN ACCORDANCE WITH 1041.1 FILED BY DEFENDANT.

* * * * *

16-JUL-2007 ENAJD – ENTRY OF APPEAR/ JURY DEMAND

ENTRY OF APPEARANCE OF JOSEPH M. O'NEILL AND KEVIN J. O'BRIAN FILED ON BEHALF OF DFT VIAD CORP. SHORT FORM ANSWER WITH ALL AFFIRMATIVE DEFENSES IN ACCORDANCE WITH 1041.1 FILED BY DEFENDANT(S).

* * * * *

29-JAN-2008 PRSBP – PRAECIPE TO SUBSTITUTE PARTY

SUGGESTED OF RECORD THAT PLAINTIFF GEORGE M. CORSON HAS DIED ON MAY 17, 2007 AND GLORIA GAIL KURNS EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED IS SUBSTITUTED AS PARTY PLAINTIFF.

* * * * *

25-MAR-2008 MTSJD – MOTION FOR SUMMARY JUDGMENT – VIAD CORP

84-08030884 RESPONSE DATE: 4-11-08. REPLY DATE: 4-16-08.

* * * * *

25-MAR-2008 MTSJD – MOTION FOR SUMMARY JUDGMENT – SOO LINE RAILROAD

02-08030802 RESPONSE DATE: 4-11-08. REPLY DATE: 4-16-08.

* * * * *

25-MAR-2008 MTSJD – MOTION FOR SUMMARY JUDGMENT – RAILROAD FRICTION CORP

32-08030832 PLAINTIFFS RESPONSE DATE 4-11-2008: DEFENDANTS REPLY DATE 4-16-2008.

* * * * *

11-APR-2008 MTANS – ANSWER (MOTION/PETITION) FILED

32-08030832 PLAINTIFFS RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED.

* * * * *

11-APR-2008 MTANS – ANSWER (MOTION/PETITION) FILED

84-08030884 PLAINTIFFS RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED.

* * * * *

11-APR-2008 MTANS – ANSWER (MOTION/PETITION) FILED

02-08030802 PLAINTIFFS RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED.

* * * * *

16-APR-2008 REPLY – REPLY FILED – SOO LINE RAILROAD

02-08030802 DEFENDANTS REPLY TO PLAINTIFFS OPPOSITION THE MOTION FOR SUMMARY JUDGMENT.

* * * * *

18-APR-2008 REPLY – REPLY FILED – VIAD CORP

84-08030884 DEFENDANTS' REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT.

* * * * *

21-APR-2008 MTASN – MOTION ASSIGNED

84-08030884 CONTESTED MOTION FOR SUMMARY JUDGMENT ASSIGNED TO JUDGE TERESHKO ON 4-21-2008.

* * * * *

22-APR-2008 MTASN – MOTION ASSIGNED

32-08030832 CONTESTED MOTION FOR SUMMARY JUDGMENT ASSIGNED TO JUDGE TERESHKO ON 4-22-2008.

* * * * *

23-APR-2008 REPLY – REPLY FILED

84-08030884 PLAINTIFFS COUNTER-REPLY TO DEFENDANT VIADS' REPLY TO PLAINTIFF OPPOSI-

TION TO VIADS' MOTION FOR SUMMARY JUDGMENT.

* * * * *

24-APR-2008 REPLY – REPLY FILED

02-08030802 PLAINTIFFS COUNTER-REPLY TO DEFENDANTS REPLY TO PLAINTIFFS OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT.

24-APR-2008 REPLY – REPLY FILED

32-08030832 PLAINTIFFS COUNTER-REPLY TO DEFENDANTS REPLY TO PLAINTIFFS OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT.

* * * * *

1-MAY-2008 REPLY – REPLY FILED

32-08030832 REPLY TO PLAINTIFFS RESPONSE TO MOTION FOR SUMMARY JUDGMENT OF DEFENDANT RAILROAD FRICTION PRODUCTS CORPORATION.

* * * * *

9-MAY-2008 ORDER – ORDER ENTERED/236 NOTICE GIVEN

02-08030802 AND NOW, THIS 8 DAY OF MAY 2008, UPON CONSIDERATION OF THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANT, SOO LINE RAILROAD, ET. AL., RESPONSES THERE-

TO. IT IS HEREBY ORDERED AND DECREED THAT THE MOTION FOR SUMMARY JUDGMENT IS GRANTED IN FAVOR OF DEFENDANT SOO LINE RAILROAD, ET. AL., AND ALL CLAIMS AGAINST DEFENDANT, SOO LINE RAILROAD, ET. AL., BY ALL PARTIES, EITHER EXPRESSED OR IMPLIED, ARE HEREBY DISMISSED IN THEIR ENTIRETY WITH PREJUDICE. . . . . BY THE COURT: TERESHKO, J. 05-08-08.

* * * * *

13-MAY-2008 RMEDC – NOT OF REMOVAL TO US DIST CT

NOTICE OF REMOVAL TO THE U.S. (EASTERN) DISTRICT COURT UNDER 03-CV-2216 FILED.

13-MAY-2008 ORDER – ORDER ENTERED/236 NOTICE GIVEN

32-08030832 AND NOW, TO WIT, THIS 13 DAY OF MAY 2008, THE MOTION FOR SUMMARY JUDGMENT OF RAILROAD FRICTION IS HEREBY DENIED. . . . . BY THE COURT: TERESHKO, J. 05-13-08.

* * * * *

13-MAY-2008 ORDER – ORDER ENTERED/236 NOTICE

84-08030884 AND NOW, TO WIT, THIS 13TH DAY OF MAY, 2008, THE MOTION FOR SUMMARY

JUDGMENT OF VIAD IS HEREBY DENIED . . . . BY THE COURT: JUDGE ALLAN L. TERESHKO.

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
(Philadelphia)

No. 2:08-cv-02216-MSG

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,
Plaintiffs,

v.

A.W. CHESTERTON INC., ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
5/13/08	1	NOTICE OF REMOVAL by RAILROAD FRICTION PRODUCTS CORPORATION from Philadelphia County, case number 001384, June Term, 2007 and Certificate of Service. (Filing fee $ 350 receipt number 948254) (Attachments: #1 Exhibit, #2 Exhibit, #3 Exhibit) (cw,) (Entered: 05/13/2008)
		* * * * *
8/11/08	6	MOTION for Reconsideration *Grant of Summary Judgment* to Soo Line filed by GLORIA GAIL KURNS. (Attachments: #1 Exhibit A, #2 Exhi-

bit B, #3 Exhibit C, #4 Exhibit D, #5 Exhibit E, #6 Exhibit F, #7 Exhibit G) (PAUL, ROBERT) (Entered: 08/11/2008)

* * * * *

9/12/08 13 ORDER THAT PLAINTIFFS' MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT IS DENIED WITHOUT PREJUDICE AS THIS COURT IS WITHOUT JURISDICTION OVER THIS MATTER. SIGNED BY HONORABLE JAMES T. GILES ON 9/12/2008. 9/12/2008 ENTERED AND COPIES E-MAILED. (mbh,) (Entered: 09/12/2008)

* * * * *

9/16/08 15 MOTION for Summary Judgment filed by VIAD CORP. Memorandum, Certificate of Service. (Attachments: #1 Exhibit A, #2 Exhibit B PART 1, #3 Exhibit B Part 2, #4 Exhibit B Part 3, #5 Exhibit C, D, E, #6 Exhibit F,G,H,I, #7 Exhibit J,K,L, #8 Exhibit M,N,O,P, #9 Exhibit Q,R,S,T, U) (O'BRIEN, KEVIN) (Entered: 09/16/2008)

9/29/08 16 Answer to Motion re 15 MOTION for Summary Judgment filed by GLORIA GAIL KURNS, Memorandum, Certificate of Service. (Attachments: #1 Exhibit A, #2 Exhibit B, #3 Exhibit C, #4 Exhibit D, #5 Exhibit E, #6 Exhibit F, #7 Exhibit G, #8 Exhibit H) (PAUL,

ROBERT) Modified on 10/1/2008 (nd,). (Entered: 09/29/2008)

10/8/08 17 REPLY to Response to Motion re 15 MOTION for Summary Judgment filed by VIAD CORP. (O'BRIEN, KEVIN) (Entered: 10/08/2008)

10/27/08 18 MOTION for Summary Judgment filed by RAILROAD FRICTION PRODUCTS CORPORATION. Memorandum of Law and Certificate of Service. (Attachments: #1 Exhibit A – Plaintiffs' Complaint) (LOCKETT, MARK) (Entered: 10/27/2008)

11/12/08 19 RESPONSE to Motion re 18 MOTION for Summary Judgment *of Railroad Friction Products* filed by GLORIA GAIL KURNS, CERTIFICATE OF SERVICE. (PAUL, ROBERT) Modified on 11/13/2008 (afm,). (Entered: 11/12/2008)

* * * * *

12/16/08 23 RESPONSE BRIEF in Support re 18 MOTION for Summary Judgment filed by RAILROAD FRICTION PRODUCTS CORPORATION, Certificate of Service. (Attachments: #1 Exhibit A – Part I – RFPC's Motion for Summary Judgment filed in State Court (pages 1 thru 30), #2 Exhibit A to RFPC's Reply Brief (Part II – pgs. 31-69)) (LOCKETT, MARK) Modified on 12/17/2008 (nd,). (Entered: 12/16/2008)

1/16/09	24	REPLY to Response to Motion re 18 MOTION for Summary Judgment *TO RFPC and VIAD's Reply to Answer to Motion for Summary Judgment* filed by GLORIA GAIL KURNS. (PAUL, ROBERT) (Entered: 01/16/2009)
1/23/09	25	REPLY to Response to Motion re 15 MOTION for Summary Judgment filed by VIAD CORP. (O'BRIEN, KEVIN) (Entered: 01/23/2009)
2/3/09	26	REPLY to Response to Motion re 15 MOTION for Summary Judgment filed by VIAD CORP. (O'BRIEN, KEVIN) (Entered: 02/03/2009)
2/3/09	27	OPINION AND ORDER THAT THE SUMMARY JUDGMENT MOTIONS OF DEFTS VIAD CORPORATION AND RAILROAD FRICTION PRODUCTS CORP. RESPECTIVELY, ARE GRANTED. (SIGNED BY HONORABLE MITCHELL S. GOLDBERG ON 2/3/09.) 2/3/09 ENTERED AND COPIES E-MAILED. (gn,) (Additional attachment(s) added on 2/5/2009: #1 order) (gn,). (Entered: 02/03/2009)
2/3/09	28	ORDER THAT DEFT VIAD CORP.'S MOTION TO FILE A RESPONSE MEMORANDUM TO PLFF'S COUNTER REPLY TO DEFT'S MOTION FOR SUMMARY JUDGMENT (DOC #24) IS DENIED AS MOOT. (SIGNED BY HONORABLE MITCHELL S. GOLDBERG ON 2/2/09.) 2/3/09 ENTERED AND COPIES E-

MAILED. (gn,) (Additional attachment(s) added on 2/5/2009: #1 Main Doc.) (mbh,). (Entered: 02/03/2009)

* * * * *

3/4/09 30 NOTICE OF APPEAL by GLORIA GAIL KURNS. Copies to Judge, Clerk USCA, Appeals Clerk and ROBERT E. PAUL, Certificate of Service. (PAUL, ROBERT) Modified on 3/4/2009 (nd,). (Entered: 03/04/2009)

* * * * *

10/13/10 42 ORDER of USCA as to 30 Notice of Appeal filed by GLORIA GAIL KURNS. It is Ordered and Adjudged by this Court that the judgment of the District Court entered 2/3/09 be and the same is hereby affirmed. (mbh,) (Entered: 10/13/2010)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1634

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,
Plaintiffs-Appellants,

v.

A.W. CHESTERTON INC., ET AL.,
Defendants-Appellees.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
3/11/09	CIVIL CASE DOCKETED. Notice filed by Appellants Freida E. Jung Corson and Gloria Gail Kurns. (PDB)
	* * * * *
4/24/09	ECF FILER: MOTION FOR SUMMARY ACTION REMAND TO STATE COURT FOR LACK OF SUBJECT MATTER JURISDICTION filed by Appellants Freida E. Jung Corson and Gloria Gail Kurns. Response due on or before 05/04/2009. Certificate of Service dated 04/24/2009. [Edited 04/24/2009 by PDB] (REP)
	* * * * *

5/6/09 ECF FILER: Response filed by Appellee RR Friction to Motion by appellants for summary action remand to state court for lack of jurisdiction. Certificate of Service dated 05/06/2009. [Edited 05/07/2009 by PDB] (RHO)

5/6/09 ECF FILER: Response filed by Appellee Viad Corp to Motion by appellants for summary action remand to state court for lack of jurisdiction. Certificate of Service dated 05/06/2009. [Edited 05/07/2009 by PDB] (DPH)

6/26/09 ORDER (MCKEE. FISHER and CHAGARES, Circuit Judges) denying motion for summary action to remand to state Court for lack of subject matter jurisdiction, filed. Panel No.: BCO-107. Fisher, Authoring Judge. (PDB)

* * * * *

8/4/09 ECF FILER: ELECTRONIC BRIEF with Volume I of the Appendix attached on behalf of Appellants Freida E. Jung Corson and Gloria Gail Kurns, filed. Certificate of Service dated 08/04/2009 by US mail. [Text edited to indicate volume I attached; volume II will be removed upon re-filing] [Edited 08/05/2009 by EAF] (REP)

* * * * *

8/5/09 ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellants Freida E. Jung Corson and Gloria Gail Kurns, filed. Manner of Service: mail.

Certificate of Service dated 08/04/2009. [Edited text to remove modifier "corrected"] [Edited 08/05/2009 by EAF] (REP)

* * * * *

9/3/09 ECF FILER: ELECTRONIC BRIEF on behalf of Appellee Viad Corp, filed. Certificate of Service dated 09/03/2009 by US mail. (EGM)

9/3/09 ECF FILER: ELECTRONIC BRIEF with Addendum attached on behalf of Appellee RR Friction, filed. Certificate of Service dated 09/03/2009 by US mail, email. (RHO)

* * * * *

10/28/09 LETTER dated 10/27/2009 filed pursuant to Rule 28(j) from counsel for Appellants Freida E. Jung Corson and Gloria Gail Kurns. SEND TO MERITS PANEL. (PDB)

11/2/09 ECF FILER: Response filed by Appellee Viad Corp to Rule 28(j) letter. Certificate of Service dated 11/02/2009. This document will be SENT TO THE MERITS PANEL, if/when applicable. (EGM)

* * * * *

11/2/09 ECF FILER: Response filed by Appellee RR Friction to Rule 28(j) letter. Certificate of Service dated 11/02/2009. This document will be SENT TO THE

MERITS PANEL, if/when applicable. (WTM)

* * * * *

12/31/09 ECF FILER: Letter dated 12/31/2009, filed pursuant to Rule 28(j) from counsel for Appellee RR Friction. This document will be SENT TO THE MERITS PANEL, if/when applicable. (WTM)

1/4/10 ECF FILER: Letter dated 01/04/2010, filed pursuant to Rule 28(j) from counsel for Appellee Viad Corp. This document will be SENT TO THE MERITS PANEL, if/when applicable. (EGM)

1/11/10 ARGUED on Monday, January 11, 2010 before RENDELL. AMBRO and CHAGARES, Circuit Judges

Daniel Markewich arguing for Appellee Viad Corp; Walter T. McGough, Jr. arguing for Appellee RR Friction; Robert E. Paul arguing for Appellants Gloria Gail Kurns and Freida E. Jung Corson (TLW)

* * * * *

9/9/10 PRECEDENTIAL OPINION Coram: RENDELL, AMBRO and CHAGARES. Authoring and Circuit Judges. Total Pages: 16. (TMK)

9/9/10 JUDGMENT Affirmed. (TMK)

9/22/10 ECF FILER: Petition filed by Appellants Freida E. Jung Corson and Gloria Gail Kurns for Rehearing before original

	panel and the court en banc. Certificate of Service dated 09/22/2010. (REP)
10/5/10	ORDER (MCKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, GREENAWAY and VANASKIE, Circuit Judges) denying for En Banc Rehearing filed by Appellants Gloria Gail Kurns and Freida E. Jung Corson, filed. Chagares, Authoring Judge. (PDB)
10/13/10	MANDATE ISSUED, filed. (JK)
6/6/11	NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by Gloria Gail Kurns on 01/03/2011. Supreme Court Case No. 10-879. (CRG)
6/6/11	NOTICE of U.S. Supreme Court disposition at No. 10-879. Petition for Writ of Certiorari filed by Gloria Gail Kurns granted on 06/06/2011. (CRG)

IN THE COURT OF COMMON PLEAS
FOR PHILADELPHIA COUNTY

IN RE:
ASBESTOS LITIGATION
IN PHILADELPHIA
COURT OF COMMON
PLEAS

OCTOBER TERM, 1986
No. 8610-0001

[filed Oct. 7, 1986]

PLAINTIFFS' GENERAL MASTER LONG-FORM COMPLAINT

Pursuant to an Order dated July 30, 1986, by the Honorable Edward J. Blake and the Honorable Richard B. Klein, the undersigned attorneys for plaintiffs in asbestos actions bring this Master General Long-Form Complaint against the following defendants:

[List of Defendant's Omitted]

JURISDICTION AND VENUE

1. (a) Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1332(a), as there is diversity of citizenship and the matter in controversy exceeds $10,000, exclusive of interest and costs.

(b) With respect to railroad defendants, jurisdiction is also conferred upon this Court by an Act of Congress, known as the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, (referred to herein as "F.E.L.A.").

2. This Court is the proper court of venue since the acts complained of herein occurred within the

Commonwealth of Pennsylvania and within the Eastern District of Pennsylvania, and/or since all defendants are doing business within the Eastern District of Pennsylvania, pursuant to 28 U.S.C. §1391(a) and (c), by the sale or shipment of asbestos in all forms through or in the Eastern District of Pennsylvania.

3. Pursuant to the Order of This Court, this Complaint is a Master Complaint filed for all plaintiffs represented by any plaintiffs' counsel who has signed agreement to the Master Long-Form Complaint and, by operation of such order, all allegations pleaded herein are deemed pleaded in any "Short-Form" Complaint hereafter filed.

DEFENDANTS

[List of Defendants in Paragraph 4 Omitted]

5. (a) At all times material hereto, defendants and/or their predecessors acted through their agents, servants or employees, who were acting within the scope of their employment on the business of the defendants.

(b) The defendants are all corporations, companies or other business entities, which, during all times material hereto, and for a long time prior thereto, have been and/or are now engaged, directly or indirectly, in the mining, milling, manufacturing, producing, processing, compounding, converting, selling, merchandising, supplying, distributing and/or otherwise placing in the stream of commerce, asbestos, material containing asbestos, asbestos products and asbestos compounds (hereinafter collectively referred to as "asbestos products"). The term "asbestos products," for the purposes of this action, shall include asbestos fiber in any form and manufactured or finished products containing asbestos.

COUNT I – NEGLIGENCE AND OUTRAGEOUS CONDUCT

6. Plaintiffs hereby incorporate by reference paragraphs 1 through 5 inclusive, as if each of said paragraphs were set forth fully hereunder.

7. At all times material hereto, the asbestos products mined, manufactured, produced, processed, compounded, converted, sold, merchandised, supplied, distributed and/or otherwise placed in the stream of commerce by the defendants which the plaintiffs continually worked with, used, handled, and were caused to come into contact with and be exposed to were under the exclusive control of the defendants and, accordingly, plaintiffs invoke the Doctrines of Exclusive Control and Res Ipsa Loquitur.

8. At all times material hereto, defendants knew or should and/or could have known that their asbestos products, as set forth above and in their ordinary and foreseeable use would be used in connection with installation of insulation in new construction, would be used for installation of insulation in reconstruction and repair, would be used in the manufacture of asbestos products or would be used in a variety of work settings, would be ripped out and/or removed during reconstruction and repair (and that such ripping would initially cause large quantities of asbestos dust and fibers to be released into the atmosphere of the work area for extended periods of time, to be later followed by the additional dust and fibers to be released into the atmosphere of the same work area upon the application of new asbestos products) and that asbestos dust released by those products during their intended and foreseeable use would be brought home by asbestos workers on their work clothes and tools, all of which defendants knew or

should have known created hazardous and unsafe work areas and risk to the health of plaintiffs and others similarly situated.

9. At all times material hereto, defendants mined, manufactured, produced, processed, compounded, converted, sold, merchandised, distributed, supplied, and/or otherwise placed in the stream of commerce the said asbestos products, all of which the defendants knew, or in the exercise of ordinary care should and/or could have known, were inherently defective, ultrahazardous, dangerous, deleterious, poisonous and otherwise highly harmful to the plaintiffs, and to other persons similarly situated.

10. At all times material hereto, plaintiffs, and other persons similarly situated in the general community, did not know of the nature and extent of the danger to their lungs, respiratory system, heart, other bodily parts including bone and tissue, and their general health that would result from their contact with and exposure to the defendants' asbestos products and to the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products; and, at all times material hereto, each of the defendants knew, should have known, or could have reasonably determined that the plaintiffs, and other persons similarly situated, would be in contact with and be exposed to the defendants' asbestos products and to the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products; and, despite such facts, defendants, individually, jointly and severally, as part of the conspiracy as alleged herein and/or as a result of tacit agreement or cooperation and/or as a result of industry-wide standards or practice:

(a) mined, manufactured, produced, processed, compounded, converted, sold, supplied, merchandised, distributed, and/or otherwise placed in the stream of commerce, asbestos products which defendants knew, or in the exercise of ordinary care should and/or could have known, were inherently defective, dangerous, deleterious, ultrahazardous, poisonous and otherwise highly harmful to plaintiffs, and to other persons similarly situated;

(b) affirmatively misrepresented to plaintiffs and other members of the public in advertising, labels and otherwise that their asbestos products were safe in their ordinary and forseeable use, which material misrepresentation induced plaintiffs to expose themselves to hazards;

(c) failed to take any reasonable precautions or to exercise reasonable care to adequately or sufficiently warn plaintiffs, and other persons similarly situated, of the risks, dangers and harm to which they were exposed by continuous work with, contact with, use, handling, and exposure to defendants' asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

(d) failed and omitted to provide the plaintiffs, and other persons similarly situated, with the knowledge of reasonably safe and sufficient safeguards, wearing apparel and proper safety equipment and appliances necessary to protect them from being injured, poisoned, disabled, killed, or otherwise harmed, by working with, using, handling, coming into contact with, and being exposed to the defendants' asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

(e) failed and omitted to place warnings, or adequate and sufficient warnings, on the containers of the said asbestos products regarding the risks, dangers, and harm therefrom and the precautions necessary to make said asbestos products safe for their ordinary and foreseeable use by plaintiffs' and other persons similarly situated in the general community;

(f) failed to package the said asbestos products so that, in the ordinary and foreseeable use and handling thereof, the plaintiffs, and other persons similarly situated, would not come into contact with and be exposed to the inhalation of the asbestos dust and fibers from said asbestos products;

(g) failed to take reasonable, sufficient and proper precautions reasonably calculated to reach such persons as the plaintiffs, and other persons similarly situated in the general community, to warn them of the inherently dangerous, deleterious, ultrahazardous, poisonous, and otherwise highly harmful effects of the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of the defendants' asbestos products and to instruct them in the proper and safe use and handling of said asbestos products;

(h) failed to take any reasonable, sufficient and proper precautions or to exercise reasonable care to protect the plaintiffs, and other persons similarly situated, from harm and danger resulting from working with, using, handling, coming into contact with and being exposed to the defendants' asbestos products and the inhalation of the asbestos dust and fibers from the ordinary and foreseeable use of said asbestos products;

(i) failed to adopt and enforce a safe, sufficient and proper plan and method of working with, using,

handling, and coming into contact with and being exposed to defendants' asbestos products so that plaintiffs, and other persons similarly situated, would not inhale the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

(j) failed to adequately test their respective asbestos products before offering them for sale and use so that plaintiffs, and other persons similarly situated, would not inhale the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

(k) failed to render such asbestos products safe or to provide proper and sufficient safeguards for the use and handling thereof so that plaintiffs, and other persons similarly situated, would not inhale the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

(l) failed to remove and recall said asbestos products from the stream of commerce and marketplace upon ascertaining that said asbestos products would cause asbestosis, scarred lungs, respiratory disorders, cardiovascular disorders, mesothelioma, lung cancer, other cancers and other injuries, some or all of which are permanent and may be fatal;

(m) failed to comply with the Federal Hazardous Substance Act, 15 U.S.C. §1261 et seq;

(n) failed to advise the plaintiffs, and others similarly situated in the general community, whom the defendants knew and/or should have and/or could have known had been exposed to long-term inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products, to cease all future exposure to the inhalation of all types of other fumes, smoke, dust and fibers, to

keep dust and fibers on work clothes and tools away from the home environment, to be examined by a lung specialist to determine the nature and extent of any and all diseases caused by such exposure and inhalation and to receive treatment for such diseases;

(o) defendants did or could have joined together in trade associations or industrial hygiene associations wherein information relative to the hazards of asbestos inhalation was available, but defendants by their actions, withheld such information from the plaintiffs, failed to assimilate such information for distribution to the plaintiffs, distorted such information by watering it down so that sales would not be interfered with, and actively engaged in disseminating counter information;

(p) failed to manufacture or design their products so that said asbestos could or would not be released into the ambient air during their use;

(q) failed to advise plaintiffs and others similarly situated who the defendants knew and/or should have known had been exposed to long-term inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products, of the progressive nature of the disease process to which all defendants were causing them to be subjected;

(r) failed to advise plaintiffs and other similarly situated who the defendants knew and/or should have and/or could have known had been exposed to long-term inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products, to cease all future exposure to the inhalation of all types of other fumes, smoke, dust and fibers and to be examined by a lung specialist to determine the nature and extent of any and all

diseases caused by such exposure and the inhalation of asbestos dust and fibers and to receive treatment for such diseases.

(s) were otherwise careless and negligent under the law.

COUNT II – STRICT LIABILITY

11. Plaintiffs hereby incorporate by reference paragraphs 1 through 10 inclusive, as if each of said paragraphs were set forth fully hereunder.

12. Defendants, acting individually, jointly and severally, as part of the conspiracy as alleged herein and/or as a result of tacit agreement or cooperation and/or as a result of industry-wide standards or practice knew, or in the exercise of reasonable care should and/or could have known, that their asbestos products would be sold to the public, including employers of the plaintiffs and others similarly situated, and would be used by plaintiffs, and other persons similarly employed in the general community, and would be relied upon by such persons to be fit for the use and to accomplish the purpose for which they were mined, manufactured, produced, processed, sold, supplied, distributed and/or otherwise placed in the stream of commerce; and the defendants, because of their positions as miners, manufacturers, producers, processors, sellers, suppliers and distributors, are strictly liable to the plaintiffs, for the following reasons:

(a) Defendants, as manufacturers-sellers, are engaged in the business, inter alia, of selling asbestos products;

(b) At the time of the manufacture and sale of the said asbestos products by the defendants to the plaintiffs or plaintiffs' employers, defendants knew,

or had reason to know, that the said asbestos products would be used by plaintiffs, and other persons similarly situated, as the ultimate users or consumers;

(c) The said asbestos products were sold by the defendants in a defective condition, unreasonably dangerous to the plaintiffs, and others similarly situated, as users or consumers, and that all throughout the many years of the plaintiffs' and others' similarly situated exposure to and use of the said products, the said asbestos products were expected to and did reach the users or consumers without substantial change in the condition in which they were sold;

(d) The said asbestos products were defective in that they were incapable of being made safe for their ordinary and intended use and purpose, and those uses believed safe by the general community, and said defendants failed to give adequate or sufficient warnings or instructions about the risks, dangers, and harm inherent in said asbestos products;

(e) The defendants affirmatively mispresented to plaintiffs and other members of the public in advertising, labels and otherwise that their asbestos products were safe in their ordinary and forseeable use, which material misrepresentation induced plaintiffs and others to expose themselves to hazards; and

(f) The ordinary and foreseeable use of the defendants' asbestos products is an intrinsically dangerous and ultrahazardous activity; and

(g) The said asbestos products were defective because they contained asbestos; and

(h) The said asbestos products were defective because they were defectively packaged.

COUNT III – CONSPIRACY

13. Plaintiffs hereby incorporate by reference paragraphs 1 through 12 inclusive, as if each of said paragraphs were set forth fully hereunder.

14. Defendants, individually, jointly, and in conspiracy with each other and with other entities, the identities of which are presently unknown to plaintiffs, and as an industrial group and through trade associations including, but not limited to the Air Hygiene Foundation, the Industrial Hygiene Foundation of America, the Industrial Health Foundation, the Asbestos Textile Institute, the Asbestos Information Association, the National Insulation Manufacturers Association, the Thermal Insulation Manufacturers Association, the Quebec Asbestos Mining Association, and the Saranac Laboratory since at least the 1930's, and continuing to the present, have been possessed of medical and scientific data which clearly indicated that the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of their asbestos products was unreasonably dangerous, ultrahazardous, deleterious, carcinogenic, and potentially deadly.

15. Despite the medical and scientific data possessed by and available to them, the defendants, acting willfully, maliciously, callously, deliberately, and with wanton disregard for the rights, safety, and position of plaintiffs, and other persons similarly situated, individually, jointly, and in conspiracy with each other and with other entities, the identities of which are presently unknown to plaintiffs, which conduct and conspiracy continues to the present, fraudulently and deliberately:

(a) manufactured, sold, distributed, and caused to be used inherently dangerous asbestos products

which, through their ordinary and foreseeable use, and unbeknownst to the plaintiffs, and other persons similarly situated, would result in the serious and severe injuries which plaintiffs have suffered;

(b) exposed and continued to expose plaintiffs, and other persons similarly situated, to the risks and dangers of asbestosis, mesothelioma, scarred lungs, cancer and other illnesses all of which risks and dangers defendants or their predecessors knew, should have known or could have known;

(c) participated and continue to participate in the fraudulent scheme described above to keep the plaintiffs, and other persons similarly situated in the general community, in ignorance of their rights by fraudulently misrepresenting and concealing the nature and extent of the harm which they suffered as a result of handling, working with, using and being exposed to the defendants' asbestos products and by fraudulently misrepresenting and concealing that this harm was the direct and proximate result of the occupational handling, use and exposure to the defendants' asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products and, in fact, said fraudulent scheme did keep the plaintiffs, and others similarly situated, in ignorance of their rights;

(d) intended by the fraudulent misrepresentations and willful omissions set forth above and below to induce the plaintiffs, and others similarly situated in the general community, to rely upon said fraudulent misrepresentations and willful omissions, and to continue to expose themselves to the risks and dangers that the defendants knew to be inherent in the use of and exposure to their asbestos products and

the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products, without warning the plaintiffs, and others similarly situated, of these risks and dangers, thereby depriving them of the opportunity of informed free choice as to whether to continue to use said asbestos products and to expose themselves to these dangers and risks;

(e) withheld or misrepresented the medical conditions of and altered other material and significant medical information on their employees, on other asbestos workers, on other workers in the construction industry, including plaintiffs, and withheld from or misrepresented to these workers and their families information about these workers' medical conditions, concerning, in particular, confirmatory evidence, appearance, suspicion or belief of asbestos-related diseases or other illnesses;

(f) reviewed, altered, distorted and/or caused to be misdiagnosed medical records and test results of their employees or other asbestos workers, for the purpose of intentionally, fraudulently and maliciously preventing said employees or other workers and their families, including plaintiffs, from being able to discover the true state of their medical conditions, or the true state of the medical conditions of other asbestos employees, or workers, or otherwise treating same;

(g) intended and caused their employees and other asbestos workers and their families, including plaintiffs:

(i) to refrain from or lose the ability to file workmen's compensation or other disability claims for the occupational diseases suffered by them by the defendants' seeking methods to ignore or defeat their claims;

(ii) to fail to obtain proper medical care so as to cure, arrest, abate or otherwise treat their developing or existing asbestos-related diseases or other illnesses;

(iii) to increase their risk of harm and further aggravate or complicate developing or existing asbestos related diseases or other illnesses;

(iv) to deny them the right to decide or exercise their options to withdraw from unsafe and deleterious working or household conditions, exposing them to asbestos products, asbestos dust or fibers;

(v) to keep them ignorant of their medical conditions, thereby preventing them from taking any safety or precautionary measures available either through their employment or other independent means; and,

(vi) to prevent, limit or otherwise bar their right to seek recovery of compensatory and/or punitive damages against the defendants for the injuries suffered by them and caused by said defendants;

(h) manufactured, sold and distributed asbestos products in such a manner as to camouflage and make indistinguishable, and to conceal the identity, source, and manufacturer and/or distributor of said products for the purpose of misleading and keeping ignorant the users and consumers of same, thereby preventing injured plaintiffs from identifying and suing the proper defendant or defendants;

(i) entered into secret relabelling and distribution agreements, produced products without any labels or distinguishing characteristics, distributed products bearing no identification whatsoever, manufactured and distributed products identical in color, texture and/or appearance, and concealed the sale

and/or transfer of corporate assets or entities through "secret" contracts and/or agreements and/or through the continuation of predecessor trademarks, tradenames, logos, or labels in successor companies and/or successor products, so as to deceive the ultimate users, including the injured plaintiffs herein, as to the true identity, source, manufacturer and distributor of said hazardous products;

(j) used indistinguishable standardization of products and removal of trademarks, tradenames, markings, logos, labels or other identifying characteristics, in order to limit and exclude liability from claims brought by persons, including the plaintiffs, through the use and handling of said products and exposure to said asbestos products, asbestos dust and fibers and also entered into open and considered agreements for the purpose of concealing the identity and source of asbestos and asbestos products in the marketplace;

(k) caused to be released, published and disseminated data and/or reports concerning the dangers and/or safety of their asbestos products, which data and reports they knew, should have known, or could have reasonably determined to be incorrect, incomplete, outdated and misleading;

(l) failed and refused to provide the public, or workers such as plaintiffs who would foreseeably use and/or be exposed to their products and to the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products, with any warning as to the risks, dangers, and harm that the defendants knew, or should have known, or could have known to be inherent in the use of and exposure to said asbestos products and to the inhalation of asbestos dust and fibers in the ordinary

and foreseeable use of said products fearing that adequate and proper warnings would adversely affect sales;

(m) deliberately chose to provide patently inadequate and ambiguous warnings and intentionally failed to warn of the known risks and dangers of their asbestos products and the inhalation of asbestos dust and fibers resulting from the ordinary and foreseeable use of said products fearing that adequate and proper warnings would adversely affect sales;

(n) refused and failed to meaningfully test their asbestos products regarding the risks and dangers to persons who use or were exposed to their asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products;

(o) when the aforesaid asbestos products were tested they willfully concealed and or refused to publish adverse test results, or distorted said adverse test results so that the public and persons such as plaintiffs were misled into believing that the test results were not adverse and that their asbestos products were safe for their ordinary and forseeable use;

(p) ignored medical and scientific data which demonstrated a causal connection between asbestos exposure and asbestosis, cancer, and mesothelioma, or other diseases, or which discussed the risk of those diseases from asbestos expsoure;

(q) attempted to discredit scientists, doctors, writers, and medical literature who or which indicated, demonstrated, or established a causal connection between asbestos and asbestos related diseases;

(r) sought to create favorable publicity about the safe nature of their asbestos products for pecuniary motives when they knew of the risks and danger inherent in their asbestos products;

(s) failed to seek safe substitute products for their asbestos products because pecuniary motives of profit were followed at the expense of human lives;

(t) ignored, withheld and/or actively concealed the existence of tests, data, studies, literature and medical reports regarding the causal connection between asbestos exposure and cancer, mesothelioma, asbestosis, respiratory diseases, scarred lungs and other illnesses and diseases;

(u) chose to rely upon and cause to be disseminated reports, tests, medical and scientific data that they knew, should have known, or could have known to be inaccurate, insufficient, incomplete, outdated and *misleading medical or scientific research or data* regarding the causal connection between asbestos products and disease in order to avoid any possible adverse publicity that would affect the sales of asbestos products;

(v) refused to conduct, contribute to and/or to authorize testing and research involving the causal relationship of illness and disease to exposure to and the use of their asbestos products and the inhalation of the asbestos dust and fibers resulting from the ordinary and foreseeable use of said asbestos products fearing adverse test results and the publicity thereof would affect the highly profitable market of asbestos products sales, which pecuniary motives of profit were followed at the expense of human lives; and

(w) are presently relying upon invalid medical reports and data in order to defend suits such as those brought by clients of the undersigned.

16. Plaintiffs reasonably and in good faith relied upon the fraudulent misrepresentations, concealments, and willful omissions made by the defendants, individually, jointly, and in conspiracy with each other and with other entities, the identities of which are presently unknown to plaintiffs, regarding the safe nature of their asbestos products, which reliance resulted in illnesses and injuries to plaintiffs, the particulars of which will be more fully set forth in each plaintiffs' "Short-Form Complaint."

COUNT IV – BREACH OF WARRANTY

17. Plaintiffs hereby incorporate by reference paragraphs 1 through 16 inclusive, as if each of said paragraphs were set forth fully hereunder.

18. Defendants, acting individually, jointly and severally, as part of the conspiracy as alleged hereinabove and/or as a result of tacit agreement or cooperation and/or as a result of industry-wide standards or practice, impliedly warranted that the asbestos products which they mined, manufactured, produced, compounded, converted, processed, sold, supplied, merchandised, distributed, and/or otherwise placed in the stream of commerce were reasonably fit for use and safe for their intended purposes.

19. Defendants, acting individually, jointly and severally, as part of the conspiracy as alleged hereinabove and/or as a result of tacit agreement or cooperation and/or as a result of industry-wide standards or practice, breached said warranties to plaintiffs in that their said asbestos products were inherently defective, ultrahazardous, dangerous, unfit for use, not properly merchantable, and not safe for, nor

reasonably fit for, their intended ordinary and foreseeable use and purpose.

* * * * *

COUNT IX – WRONGFUL DEATH

42. Plaintiff hereby incorporates by reference paragraphs 1 through 41 inclusive, as if each of said paragraphs were set forth fully hereunder.

43. As the direct and proximate result of the aforesaid some of the plaintiffs or people who were exposed to the defendants' asbestos products (hereafter referred to as "decedents"), were caused to contract the diseases and injuries described herein, causing extreme pain, suffering and mental anguish and died as a direct and proximate result of defendants' gross negligence, carelessness, breach of waranty, strict liability, conspiracy, misrepresentation and willful conduct, as alleged herein.

COUNT X – DAMAGES

44. Plaintiffs hereby incorporate by reference paragraphs 1 through 43 inclusive, as if each of said paragraphs were set forth fully hereunder.

45. As a direct and proximate result of the negligence, carelessness, gross negligence, willful misconduct, breach of warranty, strict liability, fraudulent concealment, conspiracy, misrepresentation, willful omissions, recklessness and outrageous conduct of the defendants as described in Counts I-VII *supra*, plaintiffs were caused to contract diseases and injuries to plaintiffs' respiratory system, heart and other parts of the body, the full extent of which has not yet been determined, including pleural thickening, pleural placques, asbestos-related pleural disease, asbestosis, scarred lungs, cancer of the lungs and other parts of the body, mesothelioma, and/or the

risks of these same diseases, some or all of which are permanent and/or fatal, as set forth in each plaintiff's "short-form" complaint to be filed, and may suffer in the future from other diseases which have not yet been diagnosed, causing plaintiffs pain, suffering and mental anguish.

46. As a direct and proximate result of the aforesaid, plaintiffs were obliged to spend various sums of money to treat their diseases and injuries and plaintiffs continue to be obliged for the expenses of same; as a direct and proximate result of the aforesaid, plaintiffs have sustained a loss of earnings and earning capacity; and as a direct and proximate result of the aforesaid, plaintiffs' enjoyment of life has been impaired and plaintiffs' life expectancies shortened, all to plaintiffs' great loss.

47. As a direct and proximate result of the aforesaid, plaintiffs have undergone great physical pain, mental anguish, and shock to their nervous system.

48. As a direct and approximate result of the aforesaid, and since plaintiffs first learned of their injuries, plaintiffs have developed severe anxiety, hysteria or phobias, any or all of which have developed into a reasonable and traumatic fear of an increased risk of additional asbestos caused and/or related disease, including, but not limited to, cancer, resulting from exposure, directly and indirectly, to the asbestos products of the defendants.

49. As a direct and proximate result of the aforesaid, plaintiffs have and will continue to suffer permanent and ongoing psychological damage which may require future psychological and/or medical treatment.

50. As a direct and proximate result of the aforesaid, plaintiffs have and will continue to suffer a

disintegration and deterioration of the family unit and the relationships existing therein, resulting in enhanced anguish, depression and other symptoms of psychological stress and disorder.

51. As a direct and proximate cause of the aforesaid, plaintiff-spouses have suffered the loss of the plaintiff-workers' society, services and companionship and a deterioration of the marital relationship, and may continue to be so deprived, and, accordingly, plaintiff-spouses claim damages for loss of consortium.

52. As a direct and proximate result of the aforesaid, decedents incurred hospital, nursing and medical expenses. Decedents' beneficiaries have incurred hospital, nursing, medical, funeral and estate administration expenses as a result of decedents' death. Plaintiffs as Executors/Executrices of the Estates of decedents bring this claim on behalf of decedents' lawful beneficiaries for these damages and for all pecuniary losses sustained by said beneficiaries pursuant to 42 Pa. C.S.A. §8301 and 2A N.J.S.A. ¶13-1.

53. As a direct and proximate result of the aforesaid, decedents, prior to their deaths, were obliged to spend various sums of money to treat their injuries, which debts have been assumed by their estates; as a direct and proximate result of the aforesaid, decedents were caused pain, suffering, mental anguish and impairment of the enjoyment of life, until the date of their deaths; and, as a direct and proximate result of the aforesaid, decedents suffered a loss of earnings and earning capacity. Plaintiffs, as Executors/Executrices of decedents' estates bring this claim on behalf of the estates for damages under 42 Pa. C.S.A. §8302 and 2A N.J.S.A. ¶15-13.

54. As a direct and proximate result of the aforesaid, decedents and their spouses, until the time of decedents' deaths, suffered a disintegration and deterioration of the family unit and the relationships existing therein, resulting in enhanced anguish, depression and other symptoms of psychological stress and disorder. This claim is brought on behalf of the estates of decedents, pursuant to 42 Pa. C.S.A. §8302, and 2A N.J.S.A. ¶15-13 and on behalf of plaintiff-spouses in their own right.

55. As a direct and proximate result of the aforesaid, and since first learning of decedents' and/or living plaintiff-workers' injuries, all other plaintiffs have developed severe anxiety, hysteria or phobias, any and all of which has developed into a reasonable and traumatic fear of an increased risk of asbestos-caused and/or related disease, including, but not limited to, cancer to plaintiffs, resulting from exposure, directly and indirectly, to the asbestos products of defendants, to decedents' and plaintiff-workers' work clothes and tools.

56. As a direct and proximate result of the aforesaid, and including the observance of the suffering of their spouses, decedents, until the date of their deaths, suffered permanent and ongoing psychological damage; as a direct and proximate result of the aforesaid, and including the observance of the suffering and physical deterioration of their spouses, until the date of their death, plaintiffs have and will continue to suffer permanent and ongoing psychological damage which may require future psychological and/or medical treatment. Plaintiffs as Executors/Executrices or Administrators/Administratrices of decedents' estates bring the claim on behalf of the

estate for damages under 42 Pa. C.S.A. §8302, and in their own right.

WHEREFORE, Plaintiffs pray for judgment against the defendants and each of them individually, jointly and severally on each of the above Counts, for compensatory damages in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00) and punitive damages in a sum in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00) plus costs of suit, and such other and further relief as is just and proper.

PAUL, REICH & MYERS, P.C.
Firm No. 99997
By: Robert E. Paul, Esquire
Identification No. 21252
Attorney for Plaintiff
1608 Walnut Street, Suite 500
Philadelphia, PA 19103
(215) 735-9200

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION: CIVIL SECTION

GEORGE M. CORSON and FREIDA E. JUNG CORSON, H/W
122 Hilger Avenue
Lewistown, MT 59457

JUNE TERM, 2007

vs.

No. 070601384

A.W. CHESTERTON, INC. (127), ET AL.
P.O. Box 4004
Woburn, MA 01888-4004

[filed June 13, 2007]

COMPLAINT – CIVIL ACTION
ASBESTOS

---

1. Plaintiffs, George M. Corson and Freida E. Jung Corson, husband and wife, reside at 122 Hilger Avenue, Lewistown, MT, and are citizens of the State of MT.

2. Plaintiff, George M. Corson, was born on December 2, 1923, and his Social Security Number is 503-20-8017.

3. Plaintiff, George M. Corson's only dependent is his wife Freida E. Jung Corson.

4. Plaintiff, George M. Corson, has smoked approximately 1 1/2 pack(s) of cigarettes per day from 1938 until 1988.

5. Plaintiff's Social Security and IRS records will be furnished upon receipt.

6. Plaintiff's work history is as follows:

(a) From 01/01/47 to 02/01/74 – Milwaukee Road now Canadian Pacific Railroad (Mobridge, SD/Miles City, MT/Glendive, MT/Livingston, MT) as a welder/machinist.

7. Plaintiff was exposed to asbestos at all sites set forth supra.

8. Plaintiff incorporates by reference against defendants all the allegations of the Complaints filed in Joan Nealy, Executrix of Harry Platt v. Abex Corporation, et al., Philadelphia C.P. May Term, 1985, No. 2678, Rafael and Cecilia Montero v. Abex Corporation, et al., Philadelphia C.P. July Term, 1986, No. 1216, and Richard and Suzanne Balbirer v. Abex Corporation, et al., Philadelphia C.P. July Term 1986, No. 649, and in Anna Tedeschi, Administratrix of Cosmo Tedeschi v. Abex Corporation, et al., Philadelphia C.P. January Term, 1986, No. 1641, and in the Master Plaintiffs' Complaint filed and prepared pursuant to the Order establishing the Master Pleadings Procedure in the Court of Common Pleas as if fully set out herein.

9. All allegations against defendants named in this lawsuit which were made in the Complaints filed

in the lawsuits annotated in Paragraph 8 above or in the Master Complaint are incorporated by reference.

10. The defendants are those companies listed in the caption. The principal places of business and the states of incorporation of each of the defendants are set out in the above-referenced filed master complaint or herein.

(a) ACF INDUSTRIES is the successor in interest to American Car and Foundry. At all times material American car and Foundry and or its predecessors such as Brill manufactured and distributed railroad cars and these cars insulated with asbestos. Release of asbestos dust from the American Car and Foundry products caused the injuries complained of herein.

(b) Defendant, Airco Welders Supply, is a Delaware Corporation with its principal place of business at 3800 West 51st Street, Chicago, Illinois.

(c) Defendant, Allen-Bradley Company, is a Wisconsin corporation with its principal place of business at 1201 S. Second Street, Milwaukee, Wisconsin 53204. Allen-Bradley is the successor in interest to the Rostone Corporation or sole shareholder of its creature and alter ego Rostone Corporation. It is responsible for all injuries caused by Rostone or by the Rostone Division of Allen-Bradley or its predecessors. The various Rostone entities sold Rosite and other asbestos containing products to Westinghouse Electric and other entities. These asbestos products caused the injuries complained of herein.

(d) Defendant, American Standard, Inc. is the successor in interest to Westinghouse Air Brake Co., which sold asbestos-containing products such as, but not limited to, gaskets, brake shoes and brake linings. American Standard or its other predecessor,

Ideal, sold asbestos-containing boilers and cement to which plaintiff was exposed.

(e) Defendant, Amtico, Division of American Biltrite, is a Delaware Corporation with its principal place of business located at 57 River Street, Wellesley Hills, Massachusetts, 02181.

(f) At all times material to this action defendant Baltimore Ennis is successor in interest to Gibson Homan and is responsible for injuries casued by Black Jack Plastic asbestos roofing cement and other asbestos roofing products.

(g) Defendant, BBC Brown Boveri, is a Delaware corporation with its principal place of business in Delaware. It or its predecessors sold asbestos containing arc chutes, molded products and other asbestos products which caused the injuries complained of herein.

(h) Belden Manufacturing Company is a Missouri corporation with its principal place of business located in Missouri. At all times material it sold asbestos wire and cable which caused the injuries complained of herein.

(i) Defendant, BF Goodrich Company, is a New York corporation with its principal place of business located at 3925 Embassy Parkway, Akron, Ohio. At all times material it sold cement, gaskets and brake linings to which the injured person was exposed.

(j) Canadian Pacific Limited is the successor in interest to the Milwaukee Road railroad as it required all the assets of that company. It is liable for the torts of the Milwaukee including but not limited to those under the Federal Employers Liability Act as employer of the injured person herein. It is a Canadian corporation with its principal place of busi-

ness at 910 Peel Street, PO Box 6042, Centre-Ville, Montreal. Canada H3C 3E4.

(k) Canadian Pacific Rail or CP Rail is a wholly owned subsidiary and mere creation of Canadian Pacific Ltd. It is a Minnesota corporation with its principal place of business at 105 S. 5th Street, Minneapolis, Minnesota, 55402. It is the successor in interest to, and is responsible for, all the torts of the Milwaukee and Soo railroads including, but not limited to, the liability under the Federal Employers Liability Act as the employer of the injured person herein as it acquired all the assets of the Milwaukee and Soo.

(l) The defendant, Clark Equipment Co., is an Indiana corporation which, at all times material, sold equipment containing asbestos products such as brake linings and gaskets or designed to include asbestos products supplied by others.

(m) Defendant, Cleaver-Brooks, Inc., is a Delaware corporation with a principal place of business located in Lebanon, Pennsylvania. At all times material hereto Cleaver-Brooks, Inc. sold boilers which were designed or intended to be insulated with asbestos. Because the boilers failed to contain adequate and sufficient warnings of the possible hazards of asbestos, they were defective and the conduct of defendant in selling that those products without such warnings was negligent. Since asbestos insulation on the boilers had to be removed, it was dangerous and warnings should have been given.

(n) Defendant, Crouse-Hinds, is a Texas corporation with its principal place of business located in Houston, Texas. Crouse-Hinds is a mere creature and alter ego or a predecessor in interest to Cooper Industries which is liable for any and all damages

for injuries suffered from exposure to Crouse-Hinds products. Plaintiff/decedent used, handled or was exposed to Chico X asbestos fiber which was distributed or sold by Crouse-Hinds.

(o) Crown, Cork and Seal is the successor in interest to Mundet Cork and is liable for injuries caused by exposure to the asbestos products of Mundet.

(p) Defendant, Eaton Corporation, is an Ohio corporation with its principal place of business located at 1111 Superior Avenue, S.E., Cleveland, Ohio. Eaton Corporation is the successor in interest to Cutler-Hammer Inc. which sold asbestos containing brakes and other products that caused the injuries herein.

(q) Fairbanks Morse, at all times material, sold engines containing asbestos or designed its engines to contain asbestos. Exposure to asbestos on the Fairbanks Morse Engines caused the injuries complained of herein. Fairbanks is also the successor to Alco Locomotive and is liable for injuries due to exposure to asbestos on Alco locomotive products.

(r) At all times material, GATX made or leased railroad equipment containing asbestos which caused the injuries complained of herein.

(s) General Motors is a Delaware corporation with its principal place of business in Michigan. At all times it sold asbestos brake linings, clutches, gaskets and paper. It also sold vehicles designed and intended to include asbestos products either of General Motors or others including engines.

(t) At all times material General or its predecessors in interest such as Leeds and Northrup sold asbestos containing products such as but not

limited to wire and cable to which the injured party was exposed and such exposure helped cause the injuries complained of herein.

(u) Defendant, Goodyear Tire & Rubber Co., is a corporation organized and existing under the laws of the Commonwealth of Kentucky with its principal place of business in Kentucky and is doing business in the Commonwealth of Pennsylvania. At all times material hereto, defendant, Goodyear Tire & Rubber Co., manufactured, produced and sold asbestos products either directly or indirectly, in the geographical area in which plaintiffs worked and/or to the employers of the plaintiffs, including, but not limited to, asbestos brake linings.

(v) Defendant, Graybar Electric Co. is an Indiana corporation with its principal place of business in Indiana. At all times material, it sold asbestos-containing electrical products to which the injured person was exposed.

(w) Defendant, GTE Products Corporation, is the successor in interest to the company which manufactured Clark asbestos-containing brake shoes. It is responsible for all injuries suffered by persons exposed to Clark brake shoes.

(x) Defendant, Hercules Chemical, is a New Jersey corporation with its principal place of business at 111 South Street, Passaic, New Jersey. At all times material to this action defendant sold asbestos containing products such as Fireite, Hercules Furnace Cement, Hi-Heat Furnace Cement, For Heat's Sake Staput Roof and Flashing Cement to which the injured person was exposed. The injured person inhaled asbestos dust from the asbestos products which caused the injuries complained of herein.

(y) At all times material, defendant Hobart Brother Company sold asbestos-containing welding electrodes containing asbestos which caused the injuries complained of herein.

(z) Hollingsworth & Vose is a Massachusetts corporation. At all times material, it distributed asbestos to which Plaintiff was exposed and which caused the injuries complained of herein.

(aa) Defendant, HONEYWELL at all times material sold and/or installed, and thermocouples and valves containing asbestos. As a result of the asbestos being released during installation, operation or repair of the products at issue herein, the asbestos was inhaled by the injured person causing the injuries complained of herein.

(ab) At all times material Ingersoll Rand sold products insulated with asbestos.

(ac) Defendant, John Crane, Inc., formerly known as Crane Packing and John Crane-Houdaille, is a Delaware corporation with its principal place of business at 6400 Oakton Road, Morton Grove, Illinois.

(ad) Defendant, Kentile Floors, is a New York corporation with its principal place of business located at 50 Kentile Road, Plainfield, New Jersey.

(ae) Defendant, Kerite Company, is a Connecticut corporation with its principal place of business located at 49 Day Street, Seymour, Connecticut.

(af) Defendant, Lincoln Electric & Welding Co., is an Ohio corporation with its principal place of business in Ohio. At all times material hereto, defendant sold asbestos-containing Fleet-weld electrode wire. Use of this product near plaintiff caused the release of asbestos dust which plaintiff inhaled.

(ag) Defendant, Melrath Gasket, Inc., is a Pennsylvania corporation with its principal place of business located at 30th Street and West Hunting Park Avenue, Philadelphia, Pennsylvania. Melrath Gasket, Inc. is the successor in interest to, by acquisition of the assets, product lines, etc., of Melrath Gasket Company, Tannetics and TNT Liquidating and is liable for the torts of those companies.

(ah) At all times material Metropolitan Life Insurance Company conspired with others to prevent dissemination of knowledge of the possible hazards of asbestos.

(ai) At all times material defendant Minnesota Mining and Manufacturing sold asbestos products which caused the injuries complained of herein including arc proofing tape and also sold defective respirators which did not prevent the injuries herein. It is also sued as a premises defendant for asbestos exposure at its Bristol, PA plant.

(aj) Defendant, Railroad Friction Products Corporation, is a North Carolina corporation with its principal place of business located in Laurinburg, North Carolina. At all times material it sold Cobra brake shoes containing asbestos.

(ak) Rapid American is a Delaware corporation with its principal place of business in New York. It is the successor in interest to Philip Carey and Carey-Canada and is liable for injuries due to the defective asbestos products of Carey and for Carey's negligence in the sale of such asbestos products. Furthermore, No. 100 Asbestos Cement (hard finish), No. 303 Asbestos Cement, MW-50 Cement, No 707 Insulating Cement, Thermotex-B Insulating Cement, and other asbestos products, including, but not limited to, asbestos gaskets, packing and sealing devices. Defen-

dants predecessor, Philip Carey Corporation, maintained a contracting unit that installed and/or repaired asbestos products in the vicinity in which plaintiff(s) worked during his employment.

(al) Resco Holdings is a Delaware Corporation with its principal place of business in New Hampshere. At all times material it is a successor to the Pullman Company which manufactured asbestos-containing railcars and is responsible for injuries caused by Pullman, M.W. Kellogg, Henley, Rust, Swindell and Dressler or Rust Engineering and Construction.

(am) Soo Line Railroad is the successor by merger to the Milwaukee Road and is the FELA employer of the injured person.

(an) Defendant, Square D Company, is a Delaware corporation with its principal place of business located at Executive Plaza, Palatine, Illinois. It negligently sold defective asbestos-containing wire, cable, arc chutes and other asbestos-containing products including, but not limited to, brakes to which plaintiff/decedent was exposed.

(ao) PULLMAN INCORPORATED is the successor in interest to the Pullman Standard and Pullman Car companies. At all times material to this action Pullman manufactured and distributed railcars insulated with asbestos. Release of asbestos from these products caused the injuries complained of herein.

(ap) Defendant, The Budd Company, is a Pennsylvania corporation with its principal place of business in the Commonwealth of Pennsylvania. It sold trains insulated with asbestos to which plaintiff was exposed and/or brake linings and assemblies for automobiles containing asbestos.

(aq) Defendant, BOC Group, is a New York corporation with is principal place of business located at 65 E. 55th Street, New York, New York.

(ar) Defendant, Union Carbide Corporation, is a corporation organized and existing under the laws of the State of New York, with its principal place of business in Connecticut. At all times material hereto, Defendant, Union Carbide Corporation, manufactured, produced and sold, either directly or indirectly, in the geographical area in which plaintiffs worked and/or to the employers of the plaintiffs and/or to contractors on job sites on which plaintiffs worked, asbestos products, including, but not limited to, Bakelite, Calidria, Udel Polysulfane, P6050, radiator products such as Prestone antifreeze, acetyline cylinder liners and raw asbestos fiber. This fiber was used in the drilling needs to which he was exposed.

(as) Defendant, Vellumoid, Inc., is a North Carolina corporation with its principal place of business at 54 Rockdale Street, Worcester, Massachusetts. At all times material to this action Vellumoid or its predecessors in interest including W.R. Grace manufactured, distributed or sold asbestos gasket materials, rolls, or compressed sheets. As a result of its intended and foreseeable use, this equipment would become old and frayed and would emit asbestos dust and fibers which plaintiff/decedent inhaled.

(at) Defendant, Viad Corporation, is a Delaware corporation with its principal place of business in Arizona. It is the successor in interest to Baldwin Locomotive Baldwin-Lima-Hamilton and responsible for all injuries caused by exposure to asbestos products installed on Baldwin-Lima-Hamilton and which exposure caused the injuries complained of herein.

11. During the course of his employment at the worksites noted in Paragraph 6 supra, plaintiff believes and therefore avers that he was exposed to asbestos fiber or asbestos products manufactured, sold, distributed, or otherwise placed into the stream of commerce by the defendants. The term asbestos products as used herein includes asbestos-containing products such as boilers and engines and furnaces and turbines. The term asbestos-containing as used herein means products sold with asbestos or products whose designers, manufacturers and fabricators knew, should or could have known that it would be insulated or could be insulated with asbestos.

12. Plaintiff does not now know whether or not he was exposed to asbestos products at worksites other than those enumerated in Paragraph 6 above, but he reserves his right to assert at trial that he was so exposed at the other sites, should such evidence develop. Plaintiff avers that should such evidence develop, he will promptly notify defendants well in advance of trial.

13. Plaintiff, George M. Corson, was diagnosed as having contracted Mesothelioma as a result of his asbestos exposure by Dr. Brett Williams, M.D. on or about June 24, 2005 and such diagnosis was accompanied by discernible or ascertainable physical symptoms and/or functional impairment and/or other detrimental effects as a result of the exposure to asbestos. Plaintiff has developed symptoms due to his asbestos inhalations and injuries.

14. Plaintiffs plead for all of the items of damages set forth in the Complaints filed in the cases of Rafael Montero and Richard Balbirer and in the Master Complaint for all asbestos cases in the Court

of Common Pleas which Complaints are referenced in Paragraph 8 of this Complaint.

WHEREFORE, plaintiffs demand of defendants a sum in excess of Fifty Thousand Dollars ($50,000.00), exclusive of interest and costs for compensatory damages, and a sum in excess of Fifty Thousand Dollars ($50,000.00) in punitive damages.

PAUL, REICH & MYERS P.C., P.C.

By: /s/ ROBERT E. PAUL / RPM
ROBERT E. PAUL

VERIFICATION

I hereby certify that I am a plaintiff in the instant matter and the facts contained herein are true and correct to the best of my knowledge, information and belief. This statement is made subject to the penalties of law relating to unsworn falsification to authorities.

/s/ GEORGE M. CORSON

[1] COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

GEORGE M. CORSON and FREIDA E. JUNG CORSON,
Plaintiffs

JUNE TERM, 2007

vs.

No. 1384

A.W. CHESTERTON, INC., ET AL.,
Defendants

DISCOVERY

Video deposition of GEORGE M. CORSON, taken pursuant to notice, held at the Yogo Inn, 211 East Main Street, Lewistown, Montana, on Wednesday, August 22, 2007, beginning at approximately 12:00 p.m., before Lorraine M. Edwards, Court Reporter, and Commissioner of Deeds, in and for the Commonwealth of Pennsylvania, and Notary Public, in and for the State of New Jersey, there being present.

[Appearances and Index Omitted]

* * * * *

[21]

* * * * *

Q Okay. And what railroad did you go work for?
A Milwaukee Railroad.
Q And where were you working?
A Mobridge, South Dakota.
Q Where in South Dakota?

A Mobridge.

MR. MYERS: Mobridge, M-O-B-R-I-D-G-E.

BY MR. SANTORO:

Q How long did you work in Mobridge for the Milwaukee Railroad?

A About two and a half years.

MR. LEONARD: Did he say two and a half or ten years?

MR. MYERS: Two and a half at Mobridge.

MR. LEONARD: Thanks, Rich.

BY MR. SANTORO:

Q And what was your first job when you went there?

[22]

A I was a machinist helper.

Q Can you tell me what that involved?

A We done – most of it was running repair, other than we had one engine that we annualed every year, it was a different engine every year that we had one torn down that we annualed every year.

Q How long were you a machinist helper?

A Just about two years.

Q When you were say you were running repairs, what types of things did you repair?

A What type of things?

Q Yes.

A Putting on brake shoes, putting new brass and main rods and side rods on locomotives.

Q Do you remember the names of any of the railroad cars? Who made those cars? Do you remember any of those names?

A The railroad locomotives?

Q Yes. I guess I should say "locomotives".

A It seems to me like it was American Locomotive Association, and I think some of them were Baltimore.

[23]

MR. MYERS: Baldwin?

THE WITNESS: Baldwin.

MR. HADDEN: Objection.

THE WITNESS: Baldwin. I get that mixed up.

* * * * *

[24]

* * * * *

Q Were there other trades working around [25] you on the locomotive doing other things?

A Yes.

Q What other trades were working around you?

A We had pipe fitters, boilermakers, tinsmiths, painters. I guess that just about covers it.

Q And how closely were these other trades working around you? Were they all working in a close area to you?

A The painters had their special paint shop they worked in, but a lot of times they'd come out to do touch-up work on the locomotives. But the pipe fitters, boiler makers worked real close with us.

Q And what types of things did the pipe fitters work with? I'll take a guess, but did they work with pipe?

A Yeah.

Q All right. And were they insulating that pipe at all?

A Not the pipe, but they take the pipe off – see, a steam locomotive has asbestos lining around the boiler for insulation and also to protect the workers from getting [26] burnt from the boiler.

Q Right.

A Then on top of that, there's a little tin. The tinsmith took care of that. But any place there's a steam connection coming out of that boiler, I had to take care of that. That was machinist work.

Q Did you have to do anything with the insulation?

A You had to remove it out of your way. And what was the worst, I think, is when they'd bring an engine in and disassembling it, and they take this insulation off and throw it in the scrap tray which sat down on the floor, and there was quite a lot of dust coming out of that all the time.

Q Did that happen when you were a machinist helper?

A When I was a machinist apprentice.

Q Okay. That's the same thing; right?

A No. A helper apprentice, it's hard to explain it, but you start out with a little more pay than a regular apprentice did, so the company has a little more leverage over you. In other words, if you had been working [27] with a machinist and they need you to help a pipe fitter. They just tell you, George, you work with the pipe fitter today; George, you work with the electrician today; George, you work with the boilermaker today. And that's what you did. They were training you so that you could be a supervisor.

Q When you were a machinist helper for the first two and a half years, you worked around boilers; correct?

A Yes.

Q All right. And were they disassembling the boilers?

A Yeah.

Q Were they taking the insulation off of boilers?

A Yes.

Q Did they have to put new insulation on boilers?

A Yes.

Q Were you there when they did that?

A Yes.

Q Do you know the name of the company that made the new insulation?

A I'm certain it was Johns-Manfield. [28] "Manfield" ain't right?

Q Johns-Manville?

A Yeah. I can describe the insulation.

Q Okay. Why don't you do that.

A It come in strips about three and a half foot long, they were two inches inch thick, six inches wide, and they were tapered, for most of them that were used, was a six foot boiler. The circumference, the diameter of that boiler was six foot, and these pieces were beveled so they fit tight against that six foot. But if you come to a fitting where you couldn't get a regular pad around it, then we mixed up a paste, like cement, perf-a-tape cement, and you put-tied that in with a trowel.

Q Did you have to mix the cement?

A I not only mixed the cement, but two different times I ground it.

Q You ground it?

A Okay. I'll explain that to you. When they took the asbestos off an old engine that had been on there for years, it was hard and rigid from the heat. Well, they had a grinder that was just like a feed grinder, [29] and you would take this hard insulation and dump it in there and grind it and then put it in a barrel and put water on, soak it and make this mud.

Q So, they reused what was on the boiler?

A Yeah.

Q And you did that how many times?

A I did it two different times. If the fellow that was originally on the job wasn't there and they needed some more mud, George, go make the mud.

Q Did you use the new paste, the new cement, did you also work with that in mixing that up?

A The new cement?

Q Yeah.

A We didn't have new cement.

Q You just used the old?

A Yeah.

Q Okay.

MR. MYERS: What he wants to know is did you use the water to mix that? Did you personally mix the cement?

THE WITNESS: Yeah.

* * * * *

[35]

* * * * *

Q Okay. Between '50 and '53, do you remember the names of any of the locomotives that you worked on during that period, right up until the time you got laid off?

A What do you mean by the names of the locomotives?

Q The companies –

A Like L-2's, L-3's.

Q The manufacturer, who made them.

[36]

A No, I couldn't tell you who made them. They're the same that I worked on from the start.

Q Tell us again what they were.

A I'm sure they were either American Locomotives or Baldwin Locomotives.

Q Any others that you can remember?

A No.

* * * * *

[39]

* * * * *

Q Did you ever work with laggers as an apprentice; people that put on insulation?

A Putting on insulation?

Q Yes.

A Yeah.

Q Okay. Did they ever call them laggers? What did they call those people?

A The pipe fitters are the ones that done that job.

Q All right.

A They didn't call them laggers. They called them pipe fitters.

MR. MYERS: Okay.

BY MR. SANTORO:

Q Maybe they called them laggers last [40] night.

A They belong to the pipe fitters organization.

Q All right. And were they putting insulation on pipes or on the boilers?

A On the boilers.

Q Okay. And how closely were you working when they were doing that?

A Right, just like when we're sitting here.

Q Did they ever have to cut that insulation?

A Cut it?

Q Yes.

A Yeah, they had tubes they shoved underneath of it to pry it loose from the boiler.

Q So, when they were taking the insulation off of the boilers, did that create a lot of dust?

A Yes.

Q Did you breathe that dust in?

A Yes.

MR. HADDEN: Objection.

BY MR. SANTORO:

[41] Q When they cut the new insulation, the pipe fitters that cut the new insulation, whatever form it was –

A No, because you took like – do you know what a sheetrock knife is?

Q Yes.

A They took a knife and cut it and broke it.

Q Did that create any dust?

A No.

Q Okay. Did they continue to use the cement type insulation, that had to be mixed with water?

A Yeah.

Q Did you ever have to mix it when you were at Miles City?

A Yes.

Q All right. And how did you do that? Did you pour it into a bucket.

A No. We used a big barrel.

Q A big barrel; okay.

A And you had a big spoon with about a six foot handle on it, a spoon about that big on the bottom, instead of it being like a shovel straight, it was this way at the [42] bottom, and you used that spoon to mix it (Witness indicating).

Q Okay. You were holding your hands together?

A Yeah.

Q Like a shovel, like a ladle?

A Yeah.

Q Okay. And what was that cement insulation in; bags or buckets? The dry product, what was that in?

A That was insulation that – the old insulation that we ground.

Q That was the ground?

A Yeah.

Q All right. And did you breathe in that dust from that old cement?

A I'll say.

Q All right.

A When you come out of that building, you were just white.

Q Did you wear anything on your face, cover your nose?

A No.

Q Any type of respiratory protection?

A (Witness shakes head).

[43] Q No?

A (Witness shakes head).

* * * * *

[96]

* * * * *

Q Okay. When you were a machinist there, what were your job duties?

A In Northern Pacific?

Q Correct.

A General repair on steam locomotives.

[97] Q Can you tell me who made the steam locomotives there?

A I think they were made by the American Locomotive Association?

Q Any others?

A Baldwin.

Q Any others?

A That's it.

* * * * *

[142] Q Okay. How about as an apprentice, did you actually work hands-on with any products that you believe contained asbestos as an apprentice?

A Yes.

Q What type of asbestos do you believe, products that contained asbestos, do you believe you worked on as an apprentice?

A That rigid asbestos.

Q Ridged?

A That's what I would call it. It come in sheets about two foot long, six inches wide and it was beveled to fit the concave of the boiler.

Q And these boilers were part of the engine or are they separate?

A What's that?

Q When you say "boilers", just so we're on the same page, can you describe for me what you mean when you say "boilers"?

A On a steam locomotive, the boiler is almost the full length of the locomotive.

Q And as an apprentice, what would your job be to work with this product you just described, the six inch thick –

[143] A As an apprentice I did mostly what the railroad called cab boards. That was pertaining to all valves that controlled the engine, whether they was in the cab or had an extension running up to the front of the cab that opened up to rigging the valves. That is my job.

Q What would you actually do with the valves, sir? Could you just explain that to me a little bit? I apologize for asking.

A We had to take the valve off. Each valve had what we called a spud. The spud is what went in the boilers and we would have to take the spud out and that had to be renewed once a year. See, the spud

was brass and the stream going through it would cut it and so they renewed it once a year?

* * * * *

[145]

* * * * *

Q How many engines would you work on, say, in a given week? Can you approximate for me?

A Probably ten engines.

Q In a week?

A Yeah.

Q Again, your job was to work on the valves?

A Now, some of them would be – maybe I would just work there two hours on that engine and – see, if it was an annual engine, you worked on it in between other jobs, because it was – that didn't have to be out tomorrow morning to go on the line. And if one come in and had something – if there was a valve leaking, it had to be repaired, you dropped what you were doing and went and repaired that.

Q Would it be fair to say, then, you were kind of a valve guy? Would that be fair to [146] say? Was that your specialty?

A Pretty much so.

Q As part of working on the valves, would you have to handle, in any way, the insulation around the boiler?

A Yeah.

Q How would that happen? How would you do that?

A Well, you took the extension off first, then you took the bonnet off the valve, then you screw the valve out, then you got the insulation out around it

and screwed the spud out, and then you put a new spud in. What we would do is screw it out, took it to the machine shop and make a new one. They used the old one for size and or else run a tap down in it. If the threads are bad in the boiler, I would run a tap down in until I got four good threads, and then I would mark the top and took it into the machine shop and he would make a new spud. Now, so you know what I'm talking about, a spud goes in the boiler the valve goes in the spud, and they cut out from the steam.

Q So, am I correct, sir, that when I [147] asked if you would have to actually deal with insulation, you're talking about the insulation immediately around –

A Yeah.

Q – the valve stem; is that where –

A Around the valve body.

Q The valve body. How would you remove the insulation around the valve body?

A I had a tube of them about that long (Witness indicating).

Q Indicating about, what, eight inches?

A About twelve inches.

Q About twelve inches; okay.

A I took it in and flip it out, throw it away, let it fly on the floor, any place it wanted to go.

Q Was this some kind of a knife? I'm just trying to – when you say it's about twelve inches –

A A spoon affair, like this here, about that much longer, and it had like a chisel on the end of it. The only thing it is I had the blacksmith curve it. (Witness indicating).

Q And you believe this product, the [148] insulation was – I'm sorry. You believe this product contained asbestos?

A Yes, I know it was.

Q How do you know that, sir?

A Because I worked in the asbestos shed.

Q Where was the asbestos shed located?

A That was between the machine shop and the back shop. It was a tin building all by itself, because they didn't want to put any in the big house because they knew it was dangerous. We didn't.

Q When you say "they", you mean the railroad knew?

A Yeah, I figured that out later. At the time I didn't think about it.

Q Was it actually called the "asbestos shop"?

A Asbestos shed.

Q Shed. I'm sorry. Was it actually called that?

A Yeah.

Q Was that the formal name or was that just the name that the workers used?

A That's the name that everybody used because that's where they had this grinder in [149] that we ground up this old asbestos to make the paste to put around valves and stuff, like I was telling you about.

* * * * *

[150]

* * * * *

Q And just so it's clear, you would be taking the Johns-Manville old asbestos off for the boilers, take it into the shed, grinding it down and making new asbestos insulation from the same material?

A Yeah. Exactly right.

* * * * *

[155]

* * * * *

Q During this four year period, you continued to work ninety percent of the time on the valves; am I correct?

A Yeah.

Q All right. Other than removing the insulation around the valve, was there any other work that you did as an apprentice that you believe involved asbestos products or products that contained asbestos?

A No.

Q So, it was using this tool to remove –

A Other than being there when they were pulling the insulation off or putting it on. Putting it on wasn't bad, but pulling it off, there was asbestos flying everywhere.

Q When you say pull off the asbestos, where would they be pulling that off of?

A Off of the locomotive, and you carry it over – the catwalk is about two foot wide on the locomotive, you carry it over the edge, [156] drop it down into a tray, which is about ten foot. If it hit the tray, fine. If it didn't hit the tray, it was down. It was out of your way. And if it was a full line sheet, you dropped it down, it broke up and then you had powder and stuff flying all over.

Q Why would they move the insulation from the boiler?

A The boiler had to be tested, and if there was – any time you hammer tested it with a ball peen hammer and you had to mark it every one inch and if there was a soft place, then they would cut it out and renew it.

Q So, how often would – what were these, the boilermakers? Or who actually removed the insulation from the boiler?

A The pipe fitters removed it.

Q Okay. How often would they actually have to remove the insulation from a boiler?

A Once a year.

Q Once a year?

A Yeah, it was an annual test.

* * * * *

[159]

* * * * *

Q On the annuals, were they always replaced, the insulation?

A Yeah.

Q No matter what, they would just replace the insulation?

A No matter what, you took all of the insulation off of that boiler and then you put a 300 pound test on that boiler, and you went on with a hammer and tapped every so far with a hammer and you can tell if there was a soft spot, then you go back and tap around until you got the soft spot all tapped out.

Q You said the pipe fitters would remove the insulation. Who would put it back on?

A The pipe fitters put it back on, all except, like, around valves and stuff. we had to put it on.

* * * * *

[204]

* * * * *

Q Let me ask you this, when you talked about working as a helper and an apprentice and you associate the name Baldwin with locomotives, what site are you associating that name with?

A What site?

Q Yeah. Where were you working?

A At Mobridge and Miles City.

Q At both of them?

A Yeah. They both had the same engine.

[205] Q All right. I gather from what you told me before. that if I were to ask you if you associate any kind of model numbers or any kind of numbers –

A No.

Q – with the Baldwins. you could tell me?

A No.

Q Am I right?

A Right.

MR. MYERS: Same with the Americans, for that matter as was well; right?

THE WITNESS: The locomotives I worked on was G-8's, G-7's, L-2, L-3, S-2 and that's five different classes of locomotives. They were different sizes.

* * * * *

[206]

* * * * *

Q Did you actually ever replace – was it ever your job duty as a machinist or a helper replacing brake shoes?

A Yes.

Q Did you actually do that job?

A I had done that job.

Q Where was that? Where were you?

A That was both places.

Q As a helper and an apprentice?

A Yes.

Q Did you do that actually as a machinist as well?

A Yeah. We called that running repair.

Q Did you do that throughout your career, replace brake shoes? Did you do that your entire career?

A Yeah.

Q Do you know the –

A You never knew when the foreman would come out and say, George, 331 needs two brake shoes on it, would you go down and put them [207] on? And you went down and put them on. You didn't ask questions or anything else. You were told to do something, you done it.

* * * * *

[1] COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

GEORGE M. CORSON and FREIDA E. JUNG CORSON,
Plaintiffs

JUNE TERM, 2007

vs.

No. 1384

A.W. CHESTERTON, INC., ET AL.,
Defendants

PHASE I

Video deposition of GEORGE M. CORSON, taken pursuant to notice, held at the Yogo Inn, 211 East Main Street, Lewistown, Montana, on Wednesday, August 22, 2007, beginning at approximately 2:30 p.m., before Lorraine M. Edwards, Court Reporter, and Commissioner of Deeds, in and for the Commonwealth of Pennsylvania, and Notary Public, in and for the State of New Jersey, there being present.

[Appearances and Index Omitted]

* * * * *

[15]

* * * * *

Q Now, did there come a time when you worked for the Milwaukee Road Railroad?

A Yes.

Q Approximately when was that?

A 1949, I believe.

Q Where was it that you first worked for Milwaukee Road?

A Mobridge, South Dakota.

Q What did you do for them?

A I was a machinist helper.

Q What kinds of things did you do as a machinist helper?

A After the machinist took off the nuts and cotter keys and whatever needed to be done, you kept his tools for him.

Q Okay. Did your job title change?

A Yeah, I took – I went to an apprentice.

Q What did that mean?

[16] A That meant a little more money, because I would get two cents every six months raise. Big old deal, but two cents was a lot of money at that time. And, eventually, I would get more money and I went on as a helper apprentice, which, I just said, will guarantee you a supervisor job when you get out of your apprenticeship.

Q Now, during those two jobs, did you do anything where you were exposed to asbestos?

A Yes.

Q Tell the Jury about that, please.

A We worked on steam locomotive boilers, and at Mobridge, South Dakota they had reduced their force, they didn't have any pipe fitters anymore, so the machinist done the pipe fitter work and so, consequently, we done the work of taking the lagging off the boilers and putting it back on. And they usually had one boiler, one engine, stripped down at a time for an annual test.

Q What kind of engines were these? What was the power?

A They were steam power and we called them – Milwaukee called them G-8's. and they [17] were about the smallest steam engine that we had.

Q Now, how often did the boilers have to be repaired or serviced?

A Once a year.

Q And during that once a year. what would happen to the asbestos covering on it?

MR. HADDEN: Objection.

THE WITNESS: We tore it all off. Now, down in Mobridge we wasn't careful with it like they were at Mile City. We just tore it off, threw it away and put new on.

BY MR. MYERS:

Q What did they do at Mile City?

A Mile City, if there was a piece that was pretty much whole, you laid it down carefully so it didn't break so you could put it back on.

Q How long a period of time did you work as a helper and an apprentice combined at both Mobridge and Mile City?

A Six years.

Q And during those six years, most of the time you spent working on steam locomotives?

A Yes.

* * * * *

[33] Q Now. Mr. Corson, in June of 2005. did something happen that caused you to be hospitalized?

A I couldn't breathe.

Q Tell us about that.

A Well, it started when I was back in Tennessee.

Q What were you in Tennessee for?

A It was a vacation to visit our son.

Q That was George, Junior?

A Yeah. And I and one of his boys took a walk one day and about halfway I couldn't – I just had to sit down, I couldn't breathe. Well, I didn't want to ruin the wife's vacation, so when we finally got home and I told the kid. I said, don't say nothing to anybody that I had trouble breathing. So, from then on I just sat around and read, and then when we got to Great Falls off the airplane, I couldn't hardly breathe at all. And when we got home here, the next morning I went to the doctor and that's when they took the chest scan and that's when they found out it wasn't that emphysema.

Q What did they do?

[34] A They sent me to a specialist in Great Falls.

Q Were you hospitalized?

A Yes.

Q And what happened during that hospitalization?

A They operated on my lung. Took the lining out, took a bunch of the asbestos plebs off the outside of it and I was in intensive care for thirteen days.

Q Did they tell you what the problem was?

A Yes.

Q Do you –

A I didn't know it, they told – I think they were talking to my son and my daughter more than they were talking to me because I had so much Morphine

in me I didn't know whether I was on cloud thirteen or fifteen.

Q Why did you have the Morphine?

A For pain.

Q What kind of pain were you feeling?

A It's one of the most painful operations you can get. Can you imagine your lung hanging inside of you like a chunk of beef cake. When you take the lining out, there's [35] nothing but the meat there. He took the plebs of the outside and there's nothing but the meat hanging there, and you just breathe and it hurts. It's one of the – Dr. Williams said so himself, it's one of the most painful operations that he does.

Q And did it cause you pain?

A Yes, it did.

Q After you finished that hospitalization, were you still taking Morphine?

A No.

Q Could you feel any pain?

A Oh, yes, every time I moved an arm or moved my back with the incision, I got pain.

Q Now, Mr. Corson, before this operation, did you have any restrictions on your activities?

A I just couldn't do nothing.

Q Before this incident in Tennessee where you couldn't breathe, were you able to do things?

A I was able to do whatever I wanted to.

Q Since that time in June, and since this surgery, have you been able to do what you [36] wanted to do?

A No.

Q How come?

A I just can't breathe. I can't get enough oxygen or air. My system produces enough oxygen inside of my lungs, but I can't get the air from outside to go in or out. It's full of holes and it's like if you try to blow through a screen, you're not going to get it.

Q Do you know the name of the disease that you have?

A Yeah, but I can't pronounce it.

Q Would you know it if I said it?

A Yes.

Q Is it mesothelioma?

A Yes.

Q Now, since you've had that diagnosis, what has happened to your weight?

A I just keep going downhill, no matter how much I try to eat. And most of the time I just can't eat, but if I get spell where I get to eating pretty good, maybe I'll gain four or five pounds and the next week I lose it again.

[37] Q What has been the progress of your weight over the past two years?

A I went from 170 to 120 pounds today.

Q 120?

A Yes.

* * * * *

[38]

* * * * *

Q Okay, Mr. Corson, how has your health been since June 24, 2005?

A What's that?

Q How has your health been?

[39] A After I left there?

Q Yes.

A I keep going down. When I left the hospital in Billings I weighed 136 pounds.

Q When were you in the hospital in Billings?

A In Great Falls.

Q In Great Falls?

A And now I'm down to 120 pounds.

Q Mr. Corson, as you sit here today, what are your thoughts about the future?

A Well, my thoughts is I don't think I'll make it another two years at the very most. If I can last that long, I would be doing good. They've already told to make arrangements and get ready to be in the rest home, and that's $3,000 a month.

Q How do you feel about having to go to a rest home?

MR. SANTORO: Objection.

THE WITNESS: I don't want to go.

* * * * *

[1] IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL SECTION: TRIAL DIVISION

GLORIA GAIL KURNS,
EXECUTRIX OF THE
ESTATE OF GEORGE M.
CORSON, DECEASED,
AND FREIDA E. JUNG
CORSON, WIDOW IN HER
OWN RIGHT,
Plaintiffs

vs. No. 1384

A.W. CHESTERTON, INC.,
ET AL.,
Defendants

Oral Deposition of TERRY CORSON was taken pursuant to notice, held at Knipes-Cohen Veritext, 400 Market Street, 11th Floor, Philadelphia, Pennsylvania on Monday, March 3, 2008, beginning at or about 10:10 a.m., before Debra J. Veneziale, Court Reporter-Notary Public, there being present.

[Appearances and Index Omitted]

* * * * *

[35]

* * * * *

Q. * * * Do you have a recollection during this time period over a given month how many times

would you be removing, replacing and installing new brake shoes on a locomotive?

A. On a locomotive side it would – a lot of it depended on the weight of the train. Now, keep in mind that we had a three percent [36] grade for 12 miles on the Pional Hill so we were using quite a few brake shoes.

I guess on the locomotive side I would say we would probably on a six-day-a-week job we would change a dozen shoes a week.

Q. And that –

A. That could go up from there because I mean –

Q. Does that mean three locomotives? How many brakes go on a locomotive?

A. They had – they were – we ran two types of locomotives, a GP, a general purpose. They were all EMD locomotives. We had a GP which is a two-axle truck having four wheels and class brakes, two shoes per brake. So, there's –

MR. MYERS: Two shoes per brake?

THE WITNESS: Two shoes per wheel. So, four shoes per axle and six axles. So, there's 24. And then the GP locomotives had two-axle trucks. So, they only had four-wheel sets and they were four shoes per wheel.

[37] BY MR. RYAN:

Q. How long – sort of the same question with respect to the boxcars. I understand you didn't do as much work on them as you did on the freight cars – I mean on the locomotives?

A. Correct. I don't – what's the question?

Q. Well, the question is: How often or how many times a month would you be changing them?

A. Yes, the same there. Again, it was mainly reported by the train crews. So, if they called us and said hey, this car doesn't have any shoes or need shoes, then we would go out in the yard and change it. So, I would guess the amount of cars that we were handling, and back then they were probably running 50 car trains, so we get 50, 100, 200. So out of 200 cars we would – you would average probably two cars, probably eight shoes.

MR. MYERS: Eight shoes per –

THE WITNESS: Per day. Now, what that amounts to here again is you [38] wouldn't need shoes every day, but there would be days you do 20 shoes. There would be days that you do two shoes.

* * * * *

[39]

* * * * *

Q. What would dictate your installation of a half cast-iron shoe as opposed to a composition shoe?

A. The shoe that was – that came on the locomotive. We replaced in kind.

Q. So, in other words, if a locomotive had a cast iron you would replace it with a cast iron?

A. Correct.

Q. Do you remember during this time period of what the percentages of cast iron versus composition was?

A. We had – the majority was composition. The switch engine, the yard engine was a cast, BSW-1200.

Q. Do you remember the names of any of the companies that made any of the cast iron shoes?

A. Anchor sure comes to mind, but that's a guess. I would say no, not at this point.

Q. How about the composition shoes, do you remember who supplied or made any of the shoes [40] that were used in the yard when you worked with your father?

A. Those were Cobra shoes.

Q. Any others?

A. No, not that I recall.

* * * * *

[57]

* * * * *

Q. While you were at the shop you indicated it was only you and your father [58] there. Would your father as a supervisor still do brake shoe changes?

A. Absolutely. He was a working foreman. And if we had a shoe on both sides of the locomotive I'd do one, he would do the other if it was on the same truck. If it was on different trucks we never cut the air at both trucks at the same time.

* * * * *

[81]

* * * * *

Q. So, did you get a maintenance history regarding the GP38-2s when they did come to Lewistown?

A. No. When you're talking maintenance history with the EMD locomotives they had maintenance instructions, MI, and they pretty well cover all of their models and then they had the I think they called the 300 Parts Manual and that too covered, you know, all of the locomotives up until that time.

Q. Okay.

So, when I say maintenance history I just want to know is it like a repair sheet or something that came along with the locomotives that let you know what work had been done prior to you or your father doing any work?

A. See, the Federal Railway Administration covers the safety on locomotive and every locomotive has to have an inspection card and an air card. The inspection card shows how often that locomotive was inspected and if it [82] could handle. I think there were a yellow card on both sides, probably 60 days of information. And all that was whoever inspected it signed off that here's my initials, here's my date and here's the location that I inspected this locomotive.

In addition to that, the FRA says that you had to inspect the locomotive I think back then it was like 30 days. So, that information was on what they call the blue card. The annual inspection and the date and then the monthly inspection and that later changed to a quarterly inspection.

Q. Okay.

A. So, that information was visible inside the cab to anybody that went in.

Q. Right.

But the specific repairs and parts used in those repairs were not on those cards; correct?

A. No.

Q. So, you wouldn't have any of that information?

A. No.

Q. Did you have a specific inspection [83] schedule with regard to these locomotives at Lewistown?

A. Yes. We were – again, going back to the required FRA inspections, we were the daily inspection people.

Q. And what did your daily inspection consist of?

A. Brakes, safety appliances. The FRA was – they're designated – their inspection criteria. They were concerned about the locomotive engine. They didn't care if it had any water, didn't care if it had any oil, but they did care that anything somebody would grab a hold of or was meant to grab a hold of and if that wasn't secured properly and it would cause that person to get injured, that's where the FRA came in.

So, we do a walk-around inspection to insure that you had the proper piston travel, the proper thickness on the brake shoes, that the safety appliances were all secured properly, that the fuel tank was secured properly. So, those are the things that we were required to inspect.

Then in addition to that, [84] that's what was required by the regulatory authority. Then the company also required you to check all the fluid levels. So, you would check the compressor oil and the governor oil and then the engine oil and the engine water and the fuel.

Q. Okay.

So, in total, how long would it take you to do an inspection on one locomotive?

A. Thirty minutes, the inspection with no repairs.

Q. Right.

And who would typically do the inspections? Did you and your dad do them equally? Did your dad do more? Did you do more? How did that breakdown work out?

A. It was a pretty even mixture.

Q. Did it matter who did the repairs? Like did you just do them of one type or did it matter?

A. It did not matter, whatever needed to be done and whoever was available. If I was watching the fuel going into the locomotive so that it didn't over flow my dad would do it. [85] If he was watching the fuel I would do it. If he was watching the fuel I would do it. If the fueling was done we both would do it. It didn't matter.

Q. And when the inspections were done on the locomotives did you guys ever do an inspection together?

A. Oh, yes.

Q. Okay.

Do you know how often you would do inspections together?

A. I don't know. Frankly, I don't know what the question is, but I don't know that it would matter as long as the inspection got done.

And what would happen often enough is that I would do the inspection and my dad then would follow me doing a quality inspection just to let me know that – you know, there's a little bit of a competition there, that hey, you did a good job, you got everything right or hey, look at this, you better start paying more attention, that kind of stuff.

* * * * *

[1] IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL SECTION: TRIAL DIVISION

GLORIA GAIL KURNS,
EXECUTRIX OF THE
ESTATE OF GEORGE M.
CORSON, DECEASED,
AND FREIDA E. JUNG
CORSON, WIDOW IN HER
OWN RIGHT,
Plaintiffs

vs. No. 1384

A.W. CHESTERTON, INC.,
ET AL.,
Defendants

Videotaped Deposition of TERRY CORSON was taken pursuant to notice, held at Knipes-Cohen Veritext, 400 Market Street, 11th Floor, Philadelphia, Pennsylvania on Monday, March 3, 2008, beginning at or about 1:20 p.m., before Debra J. Veneziale, Court Reporter-Notary Public, and Robert Foulk, Jr., Videotape Operator, there being present.

[Appearances and Index Omitted]

* * * * *

[18]

* * * * *

Q. Let's talk about the brake changes. What kinds of brakes were there on the diesel electric locomotives?

A. There were the – they were all piston type brakes systems. The difference is that some of them were a class of tight braking. There was a brake shoe on each side of the wheel that went against the tread of the wheel and other had a single shoe that only applied to one side of the – or actually the one tread of that brake or of that freight car [19] wheel. There was a mixture of brake shoes on those brakings, whether or not it was a cast iron or a composite brake shoe.

Q. If you could give us a percentage, what percentage of the brake shoes were composite versus cast iron?

A. Probably close to an 80/20 composite.

Q. Now, in the process of changing the brakes, can you take us through that, what you and your father would do in terms of changing operation?

A. Okay. The first thing we would do is if we saw that the brake shoe needed to be changed we put a – we would generally want to cut the brakes out of that truck which means that the pistons would release and that way we wouldn't get our hand caught between the brake shoe and the wheel.

We would put a chalk, a wheel chalk on the trailer, or the lead of the truck, whichever one we were not working on. And then we would get down and we would have to release the slack adjuster. They were all manual type slack adjusters. And what a slack adjuster does is it controls the piston [20] travel.

So, the Federal Railway Administration said you have two inches to six inches, so you needed to be in there someplace. And if we changed the shoe we always would want to get it to a two inch.

So, you would – there were two types of slack adjusters that we worked on. One was a nut style where it had a lock and cap that kept the nut in place and you would just – you would – it was never a problem just taking that locking cap off of the nut.

And then as far as the nut goes, if it was a 24-inch or a 36-inch pipe wrench, because they were generally hard to maneuver, so you would back that off which would give you enough slack because the shoe that we were changing was worn and not very thick and the one that you put in was going to be thicker.

So, once you got that backed up enough you put a bar in between the wheel and the brake shoe and moved the slack so you had all the slack on that end. You pulled the brake shoe key out, and the brake shoe key is [21] what holds the brake shoe to the head. And then we moved that brake shoe and put the new brake shoe on and put that key back and then set the air up on that truck. And then measured the piston traveled, and if the piston travel was somewhere between two and two and a half inches then that was okay to go. If it was larger than that or smaller than that, then we would back off or tighten up the slack adjuster so that we would adjust the piston to the proper travel.

Q. Now, how long would this process take?

A. Depending on the problem you had with the slack adjuster it could take anywhere from 10 minutes to 30 minutes.

Q. Were there any occasions when dust was created doing this?

A. Yes, the – there was always a dusty situation. And what happened there is in the process of pounding out the brake shoe key you're moving and wiggling that brake shoe and brake head, and you had dust on top of the brake shoe and the break heads. So you had that piece. When you put the bar between you were damaging the shoe to a limited extent, [22] and that too caused dust. So, any time you moved the brake rig you were going to get dust.

Q. And when that dust was created did you breathe that dust?

A. Yes, because when you're doing all this work here you're up tight and close to the parts you're working on. So, you're not very far. Your nose is not very far from where you're working.

Q. And did your father do the same work that you did?

MR. LOCKETT: Objection.

THE WITNESS: Yes.

BY MR. MYERS:

Q. Okay.

To the best – were you able – were you in a position to observe your father working?

A. Yes.

Q. What did you see?

A. My father did – the first thing when I first started he showed me how to do the brake shoe change. He did – he walked me through it. Then I started doing the brake shoe [23] change. And then from that point on it was whoever was next to it or whoever could the work itself. So, I watched him do

brake shoe changes. He watched me do brake shoe changes. And generally, when you were doing that you were always doing something else, meaning that you were watching fuel going in the locomotive and the guy that was changing the brake shoe was right there. So, yes, I observed my father changing shoes and he observed me.

Q. Okay.

And you indicated that you breathed dust. Did you observe your father –

A. It's the same –

MR. LOCKETT: Objection.

BY MR. MYERS:

Q. Go ahead.

A. It was the same amount of dust created whoever was doing the job and you were in the same position.

* * * * *

[36]

* * * * *

Q. Now, I'd like to direct your attention to when your dad got sick with the cancer that he ended up dying from.

Do you remember when he was diagnosed with that cancer?

A. Yes, he was – we had taken to him to Great Falls. He had a lung collapse actually twice and the second time we went to a specialist in Great Falls and she determined that the best thing was to admit him to the hospital right away. And she had a specialist that would get in there and perform the [37] surgery.

I talked to the doctor before he went in and I talked to the doctor after he finished. And when he finished with his surgery and everything he told us that everything went well.

And then the next day I talked to the doctor that we saw the first time and she said that when the surgeon was in there he saw something that didn't look quite right. And he did a biopsy and it was the lining of the stomach. And so, they had that analyzed and she came back and told us that he had mesothelioma.

Q. Were you able to observe your dad in the hospital?

A. Yes.

Q. How long was he in the hospital?

A. He was in I guess 10 days. I don't know. I couldn't tell you the actual time, but when they first – I was there when they took him up there. When he first met with the doctor, the first doctor I was with him. And when she put him in the hospital I stayed there for the next six days.

[38] My brother then came in after that. My brother and my sister came in after that and my brother stayed with him. My sister kind of kept track of my mother and everything, so . . .

Q. And how did your dad do during that surgery?

A. He did – it was – you know, he was an elderly man. He struggled, but he did very well. He fought very well. And he even – once they told him that – at first the doctor came in and said that he was cancer free and of course that made him pretty happy. And then when they got the results of the tests and then she told him the he had mesothelioma. So, that kind of took a little set on him.

But he got out of that. He got out of the hospital there and he really made what I thought was some good progress. He was able to be self-sufficient. He was able to eat and get up on his own and bathe himself. So, he actually recovered pretty well from that operation.

Q. After that operation, when was the next time you saw your dad?

[39] A. The next – the next summer.

Q. Which would have been '07?

A. Which would have been, yes, '07. We saw him that summer and I came back in October and then I stayed with him for a little over a week.

Q. Well, I would like to go to the summer for the moment, the Summer of '07. What, if any, changes did you see compared with when he was in the hospital for the surgery?

A. He wasn't – my dad loved to fish. He loved to go to garage sales. He wasn't able to go fishing. He was very weak. He would get up like 10:00 in the morning. He would eat breakfast. He would sit up and visit for a while. He would go back to sleep. He would get up again a 2:00 or 3:00 in the afternoon and have a snack and go back into bed. And then he would get up at 6:00 and eat again a very, very small dinner with us and then go to bed. And then sometimes during the night he was able to get up on his own and have some kind of cereal or something. He was eating small meals and everything. But he was extremely weak and extremely tired.

[40] Q. And that was in the Summer of 2007?

A. Correct.

Q. You indicated that you came back in October?

A. Yes, I came back in October. My sister called and said that it looked like he was taking a turn for the worse, so . . .

Q. Was did you see?

A. So, I came back and I stayed there again for a week. And he had lost just a bunch of weight. There was nothing to him. He was skin and bones.

Q. What was he able to do in October?

A. He spent most of the time in bed. He – the week that I spent with him about the only time he got up is when I helped him. I got him up every other day to take a bath and get him all dried off and everything, but he was pretty well. He was eating in bed. Not getting out of bed. He was incredibly weak and just gone.

Here's a guy that used to be – you know, he was as fit as athlete that you see on TV and now he's nothing. No muscle, no nothing. Just skin and bones.

[41] Q. What was – what was his affect? What were his thoughts from day to day as you were able to observe him?

A. He knew he was dying and there were some things that – there was some things that he wanted me to do for him, making his funeral arrangements. We designed his headstone and took care of some financial things.

Q. Now, this was in October. Did there come time when you returned before his death?

A. Yes. I came back the Friday before he died. He died on a Sunday and –

Q. Tell us about that.

A. He said everything's going to be okay, Terry is here. And he never woke up again. He died at 5:30 Sunday morning.

Q. Were you with?

A. Yes.

* * * * *

PAUL, REICH & MYERS, P.C.
ATTORNEYS AT LAW
1608 WALNUT STREET, SUITE 500
PHILADELPHIA, PENNSYLVANIA 19102
Tel. (215) 735-9200 Fax (215) 735-3888

ROBERT E. PAUL
ALAN I. REICH
RICHARD P. MYERS
ELIOT PRESENT

April 22, 2008

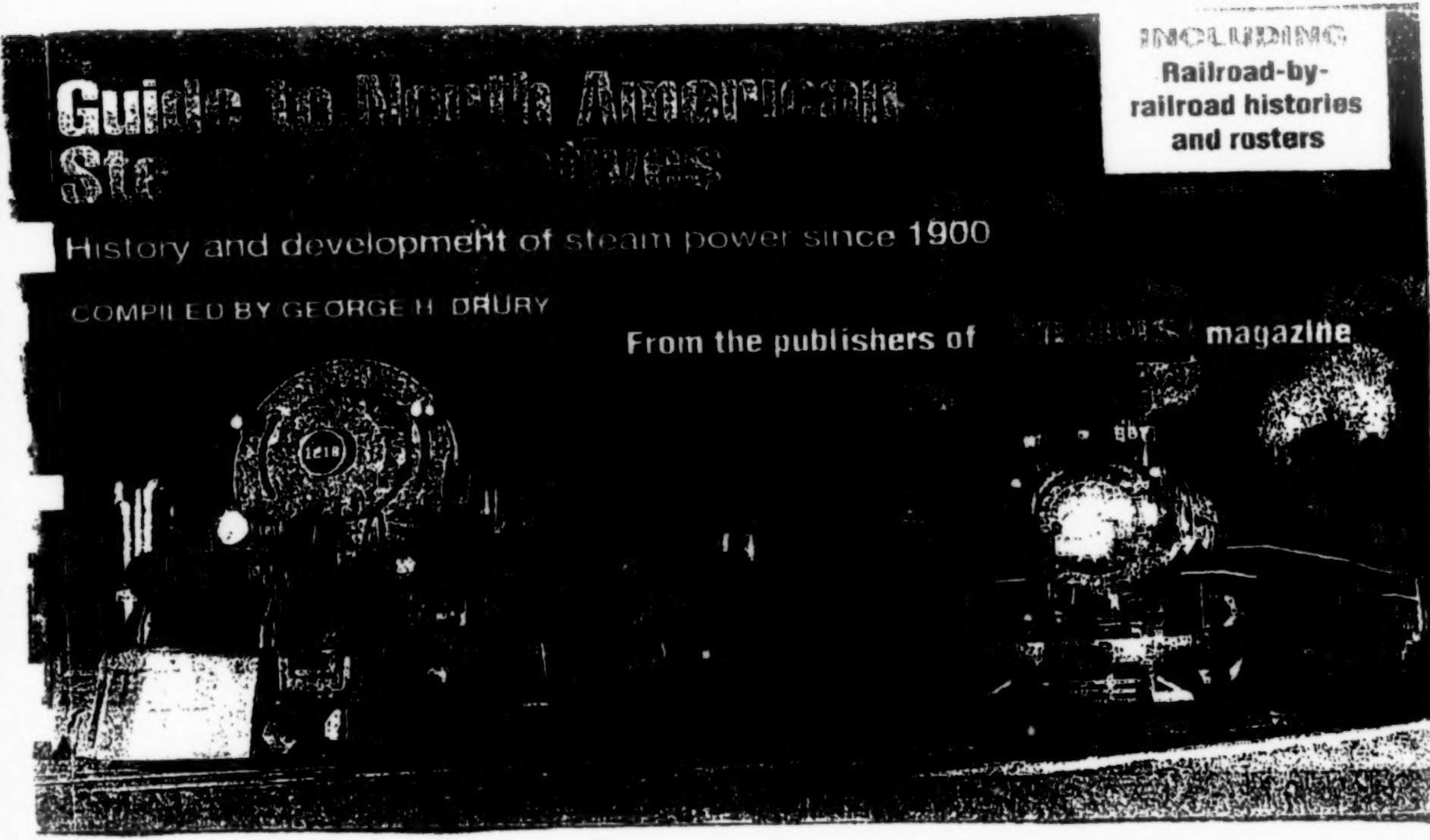
HONORABLE ALLAN TERESHKO
Court of Common Pleas
Complex Litigation Center
Room 622, City Hall
Philadelphia, PA 19107

Re: **Corson v. VIAD**
Control No. : 30884
Opposing Counsel: Jennifer Stern
May 2008 Group 2180
Plaintiff's Counter-Reply

Dear Judge Tereshko:

Pa RCP 1035 permits the nonmoving party to supplement his answer. I am therefore doing so.

* * * * *


Railroad-by-
railroad histories
and rosters
History and development of steam power since 1900
COMPILED BY GEORGE H. DRURY
From the publishers of
magazine

CMStP&P STEAM LOCOMOTIVES BUILT SINCE 1900

Type	Class	1912 Nos.	1938 Nos.	Qty	Builder	Built	Retired	Notes
0-6-0	I4a	1137-1159		23	CM&StP	1900-1902	1926-1930	
0-6-0	I5	1160-1165		6	CM&StP	1902-1903	1931-1934	
0-6-0	I5a	1166-1296						
		4500-4534	1400-1522	166	CM&StP	1903-1913	1933-1955	
0-6-0	I5b	1535, 1536		2	BLW	1907-1910	1934	Ex-CM&G
0-6-0	I6s	1297-1306	1525-1534	10	CM&StP	1913-1914	1948-1956	
0-8-0	D1	1400-1401	1550-1551	2	BLW	1913	1952	Ex-CTH&SE
2-6-0	M1	6004, 6005		2	BLW	ca. 1905	1925, 1927	
								Ex-Montana Railroad
2-6-0	M1c	2958, 2957		2	BLW	1901	1930	Ex-CTH&SE
2-6-0	M1d	2958-2964		7	Rogers	1904-1905	1930, 1934	
								Ex-CTH&SE
2-6-0	M1e	2965-2968		4	Brooks	1904-1905	1934	Ex-CM&G
2-6-0	M2	2975-2978		4	Schen	1905-1908	1927, 1934	Ex-CJRy
2-6-0	NM2	2,3		2	BLW	1901, 1908	Sold 1933	
2-6-2	K1	5000-5049	900-912	50	Brooks	1907	1935-1955	
2-6-2	K1	5500-5519	913-918	20	CM&StP	1908	1935-1954	
2-6-2	K1	5520-5569	919-936, 956					
				50	Brooks	1908	1935-1955	
2-6-2	K1	5570-5619	938-950					
			957, 958	50	CM&StP	1908-1909	1935-1955	
2-6-2	K1	5620-5644	951-960	25	Brooks	1909	1935-1955	
2-6-2	K1a	5100		1	BLW	1910	1927	
		Built as Pacific & Eastern 102, acquired with Puget Sound & Willapa Harbor						
2-6-6-2	N1	9500-9524		25	Schen	1910-1911	1927-1935	
								17 rebuilt to N3
2-6-6-2	N2	9100-9104, 9600-9610						
			90-92	16	Schen	1912	1934-35, 1949	
2-6-6-2	N3	9300-9316	50-66	17		1929-1931	1950-1954	
								Rebuilt from N1
2-8-0	C1	7000-7064	1375-1395	65	CM&StP	1904-1907	1934-1949	
2-8-0	C1	7065-7068	1396 (ex-7066)	4	BLW	1901	1934-1940	

Type	Class	1912 Nos.	1938 Nos.	Qty	Builder	Built	Retired	Notes
2-8-0	C1d	7069-7078		10	Rogers	1908-1909	1934-1936	
								Ex-CTH&SE
2-8-0	C1e	7079-7083		5	Brooks	1905	1934	Ex-CM&G
2-8-0	C1f	7084-7087		4	BLW	1907& 1910	1934	Ex-CM&G
2-8-0	C2	7600-7624	1250-1311	25	CM&StP	1909-1910	1939-1955	
2-8-0	C2	7100-7149	1263-1331	50	BLW	1910	1936-1954	
2-8-0	C3b	7500-7554	1340-1344	5	Rogers	1909	1945-1949	
2-8-0	C3	7555-7560	1345-1347	6	BLW	1907;1910-11	1934-1951	
								Ex-I&WN
2-8-0	C4	7500		1	BLW	1904	1927	
								Ex-Montana Railroad
2-8-0	C5	7200-7204	1200-1204	5	CM&StP	1912	1951-1954	
2-8-0	C5	7205-7239	1205-1239	35	Brooks	1912	1945-1954	
2-8-0	C5	7240-7249	1240-1249	10	CM&StP	1913	1945-1954	
2-8-0	C7	7700-7716	1350-1368	17	Schen	1910-1918	1950-1953	
								Ex-CTH&SE
2-8-0	C9d	7584		1	BLW	1901	Sold 1926	
								Ex-Bellingham Bay & British Columbia
2-8-0	C9e	7585		1	BLW	1906	1935	
								Ex-Tacoma Eastern
2-8-2	L1	8500-8519	750-769	20	CM&StP	1909	1940-1954	
2-8-2	L2	8000-8039	600-662	40	CM&StP	1912-1913	1930-1955	
2-8-2	L2	8040-8154	612-726	115	Brooks	1912	1934-1954	
2-8-2	L2	8155-8179	681-738	25	Schen	1914	1935-1954	
2-8-2	L2	8200-8299	500-598	100	BLW	1920-1921	1935-1954	
2-8-2	L2	8300-8399	400-499	100	BLW	1922-1923	1950-1956	
2-8-2	L3	8600-8648	300-353	50	Brooks	1918	1938-1955	
2-8-2	L3	8650-8699	311-399	50	Schen	1919	1949-1956	
4-4-0	H7	731, 732		2	BLW	1901	1928	
								Ex Davenport, Rock Island & Northwestern
4-4-0	H8	900-904	40-42	5	Rogers	1904	1934-1951	Ex-CTH&SE
4-4-0	H8	905-908		4	Rogers	1905	1934	Ex-CTH&SE

CMStP&P STEAM LOCOMOTIVES BUILT SINCE 1900 (continued)

Type	Class	1912 Nos.	1938 Nos.	Qty	Builder	Built	Retired	Notes
4-4-2	A		1-4	4	Alco	1935-1937	1949, 1951	Streamlined
4-4-2	A1	3013-3017	28, 29	6	BLW	1903	1934-1940	
4-4-2	A2	3100-3127		28	BLW	1901-1903	1926-1929	Compound
4-4-2	A2b	3128-3132		5	CM&StP	1907-1908	1927-1929	Compound
4-4-2	A2c	3500-3511		12	BLW	1908-1909	1926-1930	Compound
4-4-2	A4as	3135	32	1	BLW	1909	1951	Later B4as
4-4-2	A4s	3133, 3134	30,31	2	BLW	1907	1951	Later B4s
4-6-0	B2	4137-4143		7	BLW	1900	Compound,rebuilt to G6	
4-6-0	B3	4201-4225		25	BLW	1900	Compound, rebuilt to G6	
4-6-0	B4	4301-4382		82	BLW	1900-1903	Compound, rebuilt to G7, G8	
4-6-0	G2c	2007		1	BLW	1904	1931	Ex-Tacoma Eastern
4-6-0	G4g	2185		1		1928	1930	Rebuilt from F1 No. 6000
4-6-0	G5a	2250-2264	1185-1198	15	1913-1915	1939-1945	Rebuilt from B1	
4-6-0	G5c	2265		1	BLW	1907	1927	Ex-BB&BC 32
4-6-0	G5e	2266-2275		10	BLW	1903	1934	
4-6-0	G6	2300-2332		33	CM&StP	1905-1907	1931-1948	
4-6-0	G6	2700-2712	1123-113313		Brooks	1909	1930-1948	
4-6-0	G6	2713-2717		5	BLW	1907-1908	1935	Ex-I&WN
4-6-0	G8	2350-2368	1140-1160	22		1914-1918	1932-1954	Rebuilt from B2
4-6-0	G6	2334-2336		3	BLW	1904-1906	1926,1932	Acquired with TE; 2334 sold 1926
4-6-0	G6	2372-2393	1161-1182	22		1921-1928	1941-1955	Rebuilt from B2
4-6-0	G6	2751-2775	1100-1122	23		1915-1927	1940-1954	Rebuilt from B3
4-6-0	G	2769,2765	10, 11	2		1926,1925	1951	Streamlined, classed G, 1936, 1937; destreamlined 1945; renumbered 1111, 1112 in 1948

Type	Class	1912 Nos.	1938 Nos.	Qty	Builder	Built	Retired	Notes
4-6-0	G6	2337-2340		4	Rogers	1906	1934	Ex-CTH&SE
4-6-0	G7	2400-2455	1090-1093	56	CM&StP	1904-1908	1928-1939	
4-6-0	G7	2800-2824	1094-1097	25	CM&StP	1909	1929-1940	
4-6-0	G7	2852-2866	1075-1084	10		1921	1940-1954	Rebuilt from B4
4-6-0	G7	2867-2890	1050-1073	24		1915-1920	1948-1954	Rebuilt from B4
4-6-0	G8	2800-2841	1000-1041	42		1919-1925	1948-1957	Rebuilt from B4
4-6-2	F1	6157, 6160	151, 152	2	Brooks	1910	1954	Built as F3
4-6-2	F2	6050		1	CM&StP	1905	1929	
4-6-2	F2	6301,6320	801, 812	2	Brooks	1912	1950	Built as F5
4-6-2	F3	6100-6169	150-198	70	Brooks	1910	1929-1954	
4-6-2	F4	6800-6824	875-890	25	CM&StP	1910	1934-1954	6 to F5
4-6-2	F5	6300-6349	800-846	50	Brooks	1912	1935-1954	
4-6-2	F5	6350-6354	825-857	15	CM&StP	1911-1912	1934-1954	
4-6-2	F5	6365-6370	832-856	6		1914-1926	1935-1954	Rebuilt from F4
4-6-4	F6	6400-6413	125-138	14	BLW	1930	1952-1954	
4-6-4	F6a	6414-6421	139-146	8	BLW	1931	1952, 1954	
4-6-4	F7		100-105	6	Alco	1938	1949-1951	Streamlined
4-8-4	S1	9700	250	1	BLW	1930	1954	
4-8-4	S1		251	1	CM&StP	1938	1954	
4-8-4	S2		200-240	40	BLW	1937-1940	1954-1958	No.200 renumbered to 230
4-8-4	S3		260-269	10	Alco	1944	1954, 1956	
Shay	X1	1, 25		2	Lima	1907, 1908	1927	
Shay	X2	I&WN 5, 6		2	Lima	1907	1919	

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS

GEORGE M. CORSON
AND FREIDA E. JUNG
CORSON, H/W
Plaintiffs

JUNE TERM, 2007

vs.

No. 001384

SOO LINE RAILROAD,
ET AL.
Defendants

ORDER

AND NOW, this 8th day of May, 2008, upon consideration of the Motion for Summary Judgment of Defendant, Soo Line Railroad, et al., responses thereto, it is hereby ORDERED and DECREED that the Motion for Summary Judgment is GRANTED in favor of defendant, Soo Line Railroad, et al., and all claims and cross-claims against defendant, Soo Line Railroad, et al., by all parties, either expressed or implied, are hereby DISMISSED in their entirety with PREJUDICE.

BY THE COURT:

/s/ TERESHKO, J.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL SECTION: TRIAL DIVISION

GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON,

JUN TERM, 2007

vs.

No. 0706-1384

A.W. CHESTERTON, INC.

ASBESTOS CASE

ORDER

AND NOW, to wit, this 13th day of May, 2008, the motion for summary judgment of Railroad Friction is hereby Denied.

BY THE COURT:

/s/ TERESHKO, J.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL SECTION: TRIAL DIVISION

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON,	JUN TERM, 2007
vs.	No. 0706-1384
A.W. CHESTERTON, INC.	ASBESTOS CASE

ORDER

AND NOW, to wit, this 13th day of May, 2008, the motion for summary judgment of VIAD is hereby Denied.

BY THE COURT:

/s/ TERESHKO, J.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

MDL Docket No. 875

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION

This Documents Relates to:

Case No. 2:08-CV-2216 (E.D. Pa.)

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,
Plaintiffs,

v.

RAILROAD FRICTION PRODUCTS CORPORATION, ET AL.,
Defendants.

VIAD CORP'S
MOTION FOR SUMMARY JUDGMENT

AND NOW, comes defendant Viad Corp, by and through its undersigned attorneys, Marks, O'Neill, O'Brien & Courtney, P.C. and Mound Cotton Wollan & Greengrass, and respectfully requests this Honorable Court to grant Viad's Motion for Summary Judgment on the following grounds: (1) insufficiency of product identification and (2) field preemption under the Locomotive Inspection Act, 49 U.S.C. §§ 20701-20903 (1994), and in support thereof incorporates the Memorandum of Law with the corres-

ponding exhibits, contemporaneously filed with this Court, and respectfully avers the following:

1. Plaintiff-decedent, George Corson (hereinafter "plaintiff"), died at the age 85 on January 29, 2008.

2. On or about June 13, 2007, plaintiffs, George M. Corson and Freida E. Jung Corson, filed a Complaint sounding in personal injury in the Court of Common Pleas of Philadelphia County, Pennsylvania, entitled *GEORGE M. CORSON and FREIDA E. JUNG CORSON, husband and wife, v. RAILROAD FRICTION PRODUCTS CORPORATION, et al., JUNE TERM, 2007, NO. 1384.* The complaint alleged that plaintiff's mesothelioma was caused by plaintiff's exposure to asbestos while he was employed as a machinist at Milwaukee Railroad, now Canadian Pacific Railroad, repair facilities in Mobridge, South Dakota and Miles City, Glendive, and Livingston, Montana from 1947 to 1974. (Attached as Exhibit "A" is a true and correct copy of plaintiff's Complaint.)

3. Plaintiff George Corson was deposed in this matter on August 22, 2007.

4. Plaintiff, during the course of his testimony, testified that he worked on Baldwin steam locomotives while working at Milwaukee Railroad. (The relevant portions of plaintiff's deposition are attached as Exhibit "B.")

5. Specifically, plaintiff remembered the name "Baldwin" being located on the front of the locomotive right below the boiler. The only years for which plaintiff allegedly associates the name Baldwin with the locomotives are from 1949 to 1953, when he was a helper and an apprentice on the railroad.

6. Viad is the alleged successor-in-interest to Baldwin.

7. Plaintiff testified that his exposure to asbestos from these engines was with regard to valves that controlled the engines, which had exterior insulation.

8. Importantly, he testified that these valves were covered with an insulation which was manufactured by Johns-Manville.

9. Plaintiff failed to testify that either the valves or the exterior insulation was manufactured or supplied by Viad Corp.

10. Further, plaintiff testified that other than removing the insulation from around the valve body, there was no other facet of that job that involved products that plaintiff believed may have contained asbestos.

11. Therefore, plaintiff did not testify to any asbestos-containing product manufactured by Viad Corp, but rather an external insulation manufactured by another company.

12. Assuming *arguendo* that Viad Corp made a product that contained asbestos to which plaintiff was exposed, which is expressly denied, the fact remains that plaintiff's only exposure to any prospective Viad Corp product came as a result of working on locomotives; therefore plaintiff's action is barred pursuant to and in accordance with the Locomotive Inspection Act.

13. In 1911, the United States Congress enacted the Boiler Inspection Act ("BIA"), which was amended in 1924 and is now codified at 49 U.S.C. § 20701 *et seq.*, and entitled the Locomotive Inspection Act. The BIA preempts railroad workers' claims alleging injury from products, including those containing

asbestos, that workers allegedly encountered while working on locomotives, confines their claims against the railroad to the Federal Employers' Liability Act ("FELA"), and bars all claims against manufacturers of locomotives and their components and parts. Plaintiff alleges no exposure to any product allegedly manufactured by Viad Corp other than those he encountered when working on locomotives, and his claims are accordingly barred.

WHEREFORE, defendant Viad Corp, respectfully requests this Honorable Court to grant this Motion for Summary Judgment and to dismiss Plaintiffs' claims.

Respectfully submitted,

MARKS, O'NEILL, O'BRIEN & COURTNEY, P.C.
By: /s/ Kevin. J.O'Brien/KJO 4408
Kevin J. O'Brien, Esquire
PA ID No. 38393
1880 John F. Kennedy Boulevard, Suite 1900
Philadelphia, PA 19103
(215) 564-6688 (Phone)
(215) 564-2526 (Fax)

Daniel Markewich, Esquire
(*pro hac vice*)
NY ID No. 1131317
Ellen. G. Margolis, Esquire
(*pro hac vice*)
NY ID No. 1989474
MOUND COTTON WOLLAN & GREENGRASS
One Battery Park Plaza
New York, New York 10004

(212) 804-4200 (Phone)
(212) 344-8066 (Fax)
Attorneys for Viad Corp

Dated: September 16, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL SECTION: TRIAL DIVISION

Civil Action No. 08-CV-2216

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,
Plaintiffs,

v.

A.W. CHESTERTON, INC., ET AL.,
Defendants.

[Filed Sept. 29, 2008]

ANSWER TO VIAD'S MOTION FOR SUMMARY JUDGMENT

1-4. Admitted.

5. Denied. The transcript speaks for itself.

6. Admitted. VIAD is the successor to Baldwin.

7. Denied.

8. Denied as stated. This mis-characterizes the testimony.

9. Denied as irrelevant.

10. Denied as stated.

11-13. Denied.

PAUL, REICH & MYERS, P.C.

BY: /s/ ROBERT E. PAUL
ROBERT E. PAUL

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, Appellants	CIVIL TRIAL DIVISION JUNE TERM, 2007 No. 01384
VS.	
AIRCO WELDERS SUPPLY, INC., A/K/A THE BOC GROUP, INC., SOO LINE RAILROAD, AND WESTINGHOUSE AIR BRAKE, Appellees	Superior Court Docket No. 1746 EDA 2008

OPINION

Tereshko, J.

Plaintiffs, Gloria Gail Kurns, Executrix of the Estate of George M. Corson, deceased ("Decedent") and Freida E. Jung Corson ("Plaintiffs"), appeal this Court's Orders granting Summary Judgment to the following Defendants: Airco Welders Supply, Inc. a/k/a/ The Boc Group, Inc. ("Airco"), Soo Line Railroad ("Soo Line"), and Westinghouse Air Brake ("Westinghouse") (collectively "Defendants"), and dismissing with prejudice all claims against said Defen-

dants. For the reasons herein, this Court's Orders should be affirmed.

I. BACKGROUND

Plaintiffs commenced this Asbestos Mass Tort action on June 13, 2007, alleging that Decedent contracted mesothelioma as a result of his occupational exposure to asbestos products. *See* Plaintiffs' Complaint, ¶ 11-13. On March 25, 2008, Defendants filed Motions for Summary Judgment. Plaintiffs filed their Answers on April 11, 2008. On April 16, 2008, Airco and Soo Line filed Replies, and on April 21, 2008, Westinghouse filed a Reply. On April 24, 2008, Plaintiffs filed Counter Replies to Airco and Soo Line's Replies. On April 28, 2008, Plaintiffs filed a Counter Reply to Westinghouse's Reply. On April 25, 2008, Airco filed a Reply. On April 29, 2008, Westinghouse filed its Sur-Reply. Airco and Westinghouse asserted lack of sufficient product identification as required by *Eckenrod v. GAF Corp.*, 544 A.2d 50 (Pa. Super. 1988) and its progeny. Soo Line asserted that the Federal Employers' Liability Act ("FELA"), bars recovery for claims of strict liability.

After careful review of the motions, responses, replies, and sur-reply, this Court granted summary judgment in favor of each Defendant and dismissed with prejudice Plaintiffs' claims.[1] On June 4, 2008, Plaintiffs timely filed a Notice of Appeal of the Orders granting summary judgment to these Defendants. On July 1, 2008, in response to this Court's order, Plaintiffs filed their Concise Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P.

---

[1] This Court granted summary judgment for Airco on May 13, 2008; Soo Line on May 9, 2008; and Westinghouse on May 31, 2008.

§ 1925(b), which alleged that the summary judgment motions were improperly granted in light of the facts set forth by the non-moving party. *See* Plaintiffs' Concise Statement of Errors Complained of on Appeal, 7/1/08.

II. DISCUSSION – *Eckenrod and its progney*

Plaintiffs argues that this Court erred by granting summary judgment to Defendants. The available record in the instant matter, however, failed to establish that Decedent inhaled asbestos fibers from products sold, manufactured, or supplied by the moving Defendants. Thus, summary judgment was appropriate.

"In determining whether to grant a motion for summary judgment, the trial court must view the record in the light most favorable to the non-moving party and resolve any doubts as to the existence of a genuine issue of material fact against the moving party." *Gilbert v. Monsey Prods. Co.*, 861 A.2d 275, 276 (Pa. Super. 2004). In reviewing a grant of summary judgment, an appellate court's scope of review is plenary and will reverse only upon finding that the trial court abused its discretion or erred as a matter of law. *Harahan v. AC & S, Inc.*, 816 A.2d 296 (Pa. Super. 2003).

Our Superior Court, in *Eckenrod vs. GAF Corp.*, 544 A.2d 50 (Pa. Super. 1988), set forth the elements necessary to prove a *prima facie* case of asbestos liability:

> In order for liability to attach in a products liability action, Plaintiff must establish that the injuries were caused by a product of the particular manufacturer or supplier. Additionally, in order for a plaintiff to defeat a motion for summary judgment, a plaintiff must present evidence to

> show that he inhaled asbestos fibers shed by the specific manufacturer's product. Therefore, a plaintiff must establish more than the presence of asbestos in the workplace; he must prove that he worked in the vicinity of the product's use. Summary judgment is proper when the plaintiff has failed to establish that the defendants' products were the cause of the plaintiff's injury.

Id. at 52 (internal citations omitted).

Further, our Supreme Court in *Gregg v. V-J Auto Parts Co.*, 943 A.2d 216 (Pa. 2007), recently reiterated the duty of a lower court when reviewing an asbestos motion for summary based [sic] on product identification:

> . . . [W]e believe that it is appropriate for courts; at the summary judgment stage, to make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of plaintiff's/decedent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant's product and the asserted injury.

Id. at 227.

In light of this binding precedent, we review the record herein. Decedent was deposed on August 22, 2007. His son, George Corson, was deposed on February 6, 2008, and his son, Terry Corson, was deposed on March 3, 2008. Their deposition testimony fails to establish that Decedent was exposed to asbestos fibers or asbestos dust shed from working with

Defendants' products with the frequency, regularity, and proximity required under Pennsylvania law.[2]

Airco

Airco argued that the testimony of Decedent and his sons failed to establish that Decedent was exposed to a respirable, asbestos-containing product supplied by Airco.

Decedent's son, George, testified that he worked with his father on the railroad from 1964-1968 or 1969 in Lewistown, Montana. During this time, he believes that they used Airco welding rods, torches, gauges, and gloves. *See* Deposition of George Marion Corson, 2/6/08, pp. 79-80. He further testified that, of all the duties associated with this job, he and his father probably only welded with Airco products about 5% of the time. *See id.*, at p. 83. When they were finished welding, Decedent's son testified that they would throw the welding rod stubs on the floor and then throw them away after they swept the floor, but any dust from the floor was preexisting:

> Q: Now, when you and your dad would finish welding, what would you do with the stubs that you had when you were done?
>
> A: Throw them down.
>
> Q: Throw them on the floor or somewhere else?
>
> A: Probably on the ground or on the floor. And then throw them in the garbage after we swept the floor.
>
> Q: Was the floor swept at the end of your shift?
>
> A: Yes.

---

[2] The terms "dust" and "fibers" are used interchangeably as they are microscopic and cannot generally be seen with the naked eye.

Q: Is that something that you and your dad did or someone else?

A: Him and I.

Q: Now, in the process of sweeping the floor of the welding rods, did that create any dust?

A: Yes, there was dust on the floor.

See id., at 96 (emphasis added).

When asked about the actual use of the alleged Airco products, Decedent's son testified that at no time did the products actually create respirable dust:

Q: How about the actual process of welding? Was that a dusty process?

A: Not that I'm aware of. It had smoke.

Q: How about when you would use the gauges? Was that a dusty process?

A: No.

Q: And the same question for the torches. Was any dust created?

A: No.

See id., at 96-97.

Decedent's other son, Terry Corson, testified that he worked with his father from 1971-1975, also on the railroad in Lewistown, Montana. *See* Deposition of Terry Corson, 3/3/08 p. 15. During this time, Decedent used Airco welding rods and welding consisted of about 10-15% of the time they worked in together in this location. *See id.* at 120. At no time in his deposition did he adduce that the welding done with Decedent, that is, the only work which he testified involved Airco products, created a respirable asbestos dust.

Finally, Decedent himself testified that he did not remember the name of the company which manufac-

tured the welding rods used during this time, namely Airco. *See* Deposition of George Corson, 8/22/07 p. 74 (Q: "Does the name Airco ring a bell?" A: "No.").

Plaintiffs, faced with the possibility of this Court granting summary judgment, attempted to persuade this court to adopt an "every exposure" theory, stating that when it was impossible to parse out which Defendants caused which dust, all Defendants would be liable. They state "*Gregg* does not overrule the prior opinion in *Martin* that all exposures combine to cause the disease." (Plaintiffs' Counter-Reply, 4/24/08 ¶ 5). Plaintiff's argument that "every exposure is enough" and "all exposures combine" are different standards, is invalid as a matter of law, as the *Gregg* decision makes clear:

> We do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation in every 'direct-evidence' case. The result, in our view, is to subject defendants to full joint-and-several liability for injuries and fatalities in the absence of any reasonably developed scientific reasoning that would support the conclusion that the product sold by the defendant was a substantial factor in causing the harm.

Gregg v. VJ Auto Parts Co., 943 A.2d 216, 226-227 (Pa. 2007).

Thus, considering that there is no evidence that Decedent inhaled respirable asbestos fibers from a product produced by Airco, and Plaintiffs' attempt to invoke an "every exposure" theory is legally invalid, summary judgment was proper.

Westinghouse

Defendant Westinghouse argued that the testimony of the Decedent and his sons failed to establish that Decedent was exposed to a respirable, asbestos-containing product supplied by Westinghouse. Decedent himself did not testify as to any products manufactured by Westinghouse. Decedent's sons, George and Terry, testified that the only times their father worked with Westinghouse products, was in the removal of rubber gaskets.

Decedent's son George testified, after several leading questions, that his father removed a gasket from a Westinghouse air brake compressor "about once." *See* Deposition of George Marion Corson 2/6/08 pp. 132-133. Neither of them, however, needed to take the compressor apart. *See id.*, at 92.

Decedent's son Terry testified about Westinghouse products, specifically brake valves. He stated that he did not associate asbestos-containing products with this work:

> Q: As you sit here today, do you associate any asbestos-containing components with the Westinghouse brake valves?
>
> A: On the gaskets to the brake valves they were rubber gaskets. I can only assume that they didn't have asbestos.

See Deposition of Terry Corson 3/3/08 p. 72.

Plaintiffs responded to Westinghouse's motion by stating that Railroad Friction Product Corporation ("RFPC") created and sold Cobra brake shoes, an asbestos-containing product. *See* Plaintiffs' Answer to Defendant Westinghouse Air Brake's Motion for Summary Judgment, 4/11/08. What Plaintiffs fail to properly address is the fact that RFPC is a joint ven-

ture by Westinghouse and Johns-Manville, and have not cited any law which states that one company should bear responsibility for the corporate acts of another. Even if they did, however, there is no evidence available which establishes that Westinghouse was the company which sold or distributed the Cobra brake shoes in this case.

Thus, considering that there was only one Westinghouse product actually identified, and it was a rubber and not asbestos gasket, Plaintiffs have failed to establish that Decedent was exposed to any respirable asbestos fibers manufactured by the Defendant, and summary judgment was proper.

III. DISCUSSION – Federal Employers' Liability Act

Defendant Soo Line argued that, unlike other Defendants in this action, it is entitled to summary judgment because Plaintiff is unable to establish that Soo Line was strictly liable under the Federal Employers' Liability Act ("FELA"), 45 USCA §51 (2008). FELA covers the liability of common carriers by railroad and states the following:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death or [sic] such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next

> of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 USCA §51 (2008).

Additionally, FELA is the sole remedy against negligent employers for on-the-job physical injuries sustained by such an employee. *Reidelbach v. Burlington Northern & Santa Fe Ry. Co.*, 60 P.3d 418 (2002). Therefore, unless Soo Line is at fault for common law negligence or violation of FELA for safety of its employees, no liability attaches. *O'Dea v. Byram*, 176 Minn. 67 (1928).

"To recover under the FELA for personal injuries, the Plaintiff must prove: 1) Defendants are common carriers by railroad engaged in interstate commerce; 2) that he was employed by the Defendant with duties furthering such commerce; 3) that the injuries were sustained while he was so employed; and 4) that the injuries were the result of negligence of Defendant Company." *Betoney v. Union P.R. Co.*, 701 P.2d 62 (1984).

In the case *sub judice*, Plaintiffs are unable to prove Soo Line's negligence, in fact, they offer no support whatsoever for their contention. They have not even suggested that Soo Line's negligence caused Decedent to suffer from mesothelioma. Further, there is not sufficient information that Soo Line had information sufficient to show that it knew of the dangers of asbestos exposure at the time that Dece-

dent was working for them, beginning in 1949. There is simply no evidence to the contrary.

In its Answer, Plaintiffs allude to the Boiler Inspection Act, *49 USCS §20701 (2008), et seq.*, which gives rise to strict liability claims for railroad workers. As both parties point out, current case law only permits these claims for injuries sustained while on the railroad, but not while in the shops. Plaintiffs suggest that this Court construct a ruling which would widen the scope of the Boiler Inspection Act to include injuries sustained while working in the shops. This Court declines to engage in such legislative activities.

Thus, considering that Plaintiffs have failed to make out a case of negligence and Plaintiffs are unable to pursue a strict liability theory, summary judgment was proper.

III. CONCLUSION

For the foregoing reasons, this Court's Orders granting Summary Judgment in favor of Defendants Airco and Westinghouse for insufficient product identification and Defendant Soo Line for failure to support a claim of negligence, should be AFFIRMED.

BY THE COURT:

October 9, 2008
Date

TERESHKO
ALLAN L. TERESHKO, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL Docket No. 875

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION
(No. VI),

This Documents Relates To:

Civil Action No. 2:08-CV-2216

GLORIA GAIL KURNS, EXECUTRIX OF THE
ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,
Plaintiffs

v.

RAILROAD FRICTION PRODUCTS CORPORATION, ET AL.,
Defendants

[Filed Oct. 27, 2008]

MOTION FOR SUMMARY JUDGMENT

AND NOW comes defendant Railroad Friction Products Corporation ("RFPC"), by and through its counsel, BONNER KIERNAN TREBACH & CROCIATA, LLP, and respectfully requests that this Honorable Court grant the instant Motion for Summary Judgment on the basis that plaintiff's claims are preempted by federal law, including the Locomotive Inspection Act, 49 U.S.C. § 20701 *et seq.* (1994). In support of the instant Motion, RFPC expressly

incorporates the Memorandum of Law contemporaneously filed herewith and further states as follows:

1. Plaintiff-decedent George Corson ("plaintiff"), died at the age of 85 on January 29, 2008.

2. On or about June 13, 2007, plaintiff and his spouse Freida E. Jung Corson filed a Complaint against RFPC and others in the Court of Common Pleas of Philadelphia County, Pennsylvania, entitled Corson v. Railroad Friction Products Corporation, *et al*, June Term, 2007, No. 1384. A true and correct copy is attached hereto and marked as Exhibit "A."[1]

3. The complaint alleged that plaintiff's mesothelioma was caused by plaintiff's exposure to asbestos, including RFPC's Cobra brake shoes, while he was employed as a machinist at Milwaukee Railroad, now Canadian Pacific Railroad, specifically at the repair facilities in Mobridge, South Dakota and Miles City, Gendive, and Livingston, Montana, from 1947 to 1974.

4. Beginning in 1893, the United States Congress enacted the first of a series of acts designed to regulate the design, maintenance, and safety of railroads, including the health and safety of railroad workers.

5. In 1911, Congress enacted the Boiler Inspection Act (now known as the Locomotive Inspection Act and herein referred to as the "LIA"), which is now codified at 49 U.S.C. § 20701 *et seq*.

6. The LIA preempts railroad workers' claims alleging injury from products, including asbestos-containing products that workers were exposed to while working on locomotives.

---

[1] It should be noted that this action was removed to this Court from the Philadelphia Court of Common Pleas on May 13, 2008.

7. The LIA bars all state-law tort claims against manufacturers of locomotives and component parts.

8. Plaintiff alleges no exposure to any RFPC product other than those he was allegedly exposed to while working on locomotives.

9. Accordingly, plaintiff's claims against RFPC are preempted by federal law and are barred.

WHEREFORE, defendant RFPC respectfully requests that this Honorable Court grant this Motion for Summary Judgment and dismiss plaintiff's claims with prejudice.

Respectfully submitted,

BONNER KIERNAN TREBACH & CROCIATA, LLP

BY: /s/ Mark A. Lockett
MARK A. LOCKETT, ESQUIRE
Attorney ID No. 50023
Eight Penn Center Plaza, Suite 200
1628 John F. Kennedy Boulevard
Philadelphia, PA 19103
Tel.: (215) 569-4433
Fax: (215) 569-4434
Attorneys for Defendant,
Railroad Friction Products Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL SECTION: TRIAL DIVISION

Civil Action No. 08-CV-2216

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,
Plaintiffs,

v.

A.W. CHESTERTON, INC., ET AL.,
Defendants.

[Filed Nov. 12, 2008]

ANSWERS TO MOTION FOR SUMMARY JUDGMENT OF RAILROAD FRICTION PRODUCTS

1-3. Admitted

4-9. Denied. The BIA does not bar the claim.

PAUL, REICH & MYERS, P.C.

BY: /s/ ROBERT E. PAUL
ROBERT E. PAUL

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

June 6, 2011

Mr. Richard Phillips Myers
1608 Walnut Street Suite 500
Philadelphia, PA 19103

Re: Gloria Gail Kurns, Executrix of the Estate of George M. Corson, Deceased, et al.
v. Railroad Friction Products Corporation, et al.
No. 10-879

Dear Mr. Myers:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted.

Sincerely,

/s/ WILLIAM K. SUTER
William K. Suter, Clerk

PETITIONER'S BRIEF

FILED
AUG 12 2011
OFFICE OF THE CLERK

No. 10-879

IN THE
Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, WIDOW IN HER OWN RIGHT,
Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

RICHARD P. MYERS
ROBERT E. PAUL
ALAN I. REICH
MARY GILBERTSON
PAUL, REICH & MYERS, P.C.
1608 Walnut Street
Suite 500
Philadelphia, PA 19103
(215) 735-9200

August 12, 2011

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
EMILY T.P. ROSEN
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

Library of Congress
Law Library

QUESTION PRESENTED

Whether the Locomotive Inspection Act preempts the field of state common-law claims against manufacturers of locomotives and locomotive parts by workers injured in railroad maintenance facilities, even though the Act regulates only the "use" of a locomotive "on [a] railroad line," 49 U.S.C. § 20701, and even where, as here, the events giving rise to the claims occurred before those manufacturers were subject to regulation under the Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 3

A. Legal Background 3

B. History Of Asbestos Use In Locomotives And Locomotive Parts 8

C. Factual Background And Procedural History 10

SUMMARY OF ARGUMENT 16

ARGUMENT 19

I. IMPLIED FIELD PREEMPTION DOES NOT BAR PETITIONERS' CLAIMS 19

A. Any Implied Field Preemption Under The LIA Does Not Extend To Petitioners' Claims Because Those Claims Are Not Within The Field *Regulated By The Act* 20

1. The LIA regulates only locomotives in use on a railroad line 21

2. The LIA did not apply to manufacturers of locomotives or locomotive parts, such as respondents, when the events giving rise to petitioners' claims occurred 28

B. The LIA Does Not Reflect A "Clear And Manifest" Congressional Intent To Displace State-Law Claims 31

C. The Third Circuit's Field-Preemption Ruling Is Erroneous 34

1. The Third Circuit erroneously concluded that the "in use" limitation on the LIA's regulatory scope does not affect the scope of field preemption under the Act 34

2. The Third Circuit erroneously relied on *Napier* 36

3. The Third Circuit's decision leaves injured workers without a remedy 42

II. CONFLICT PREEMPTION PROVIDES NO BASIS FOR AFFIRMING THE JUDGMENT 44

A. Conflict Preemption Is Not Properly Presented Here 44

B. In Any Event, State-Law Claims Based On Exposure To Asbestos In Rail Repair Facilities Do Not Conflict With The LIA 46

1. Failure-to-warn claims do not conflict with the LIA 46

2. Defective-design claims do not conflict with the LIA 47

CONCLUSION 52

ADDENDUM:

49 U.S.C. § 20101 ..... 1a
49 U.S.C. § 20106 ..... 1a
49 U.S.C. § 20302 ..... 2a
49 U.S.C. § 20701 ..... 5a
49 U.S.C. § 20702 ..... 5a
49 U.S.C. § 20703 ..... 7a
49 U.S.C. § 21302 ..... 8a

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001) 45

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) 45

Alabama Great S. Ry. Co. v. Hamby, 192 S.E. 467 (Ga. Ct. App. 1937) 4

Angell v. Chesapeake & Ohio Ry. Co., 618 F.2d 260 (4th Cir. 1980) 26

Baltimore & Ohio R.R. Co. v. Groeger, 266 U.S. 521 (1925) 51

Baltimore & Ohio R.R. Co. v. Hooven, 297 F. 919 (6th Cir. 1924) 24, 25, 27

Bates v. Dow AgroSciences LLC, 544 U.S. 431 (2005) 49

Brady v. Terminal R.R. Ass'n of St. Louis, 303 U.S. 10 (1938) 23, 24

Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011) 20

Chicago Great W. R.R. Co. v. Schendel, 267 U.S. 287 (1925) 24

Chicago, M. & St. P. Ry. Co. v. Artery, 137 U.S. 507 (1890) 3

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 31

City of Canton v. Harris, 489 U.S. 378 (1989) 44

Crane v. Cedar Rapids & I.C. Ry. Co., 395 U.S. 164 (1969) 5

Crockett v. Long Island R.R., 65 F.3d 274 (2d Cir. 1995) 14, 26

CSX Transp., Inc. v. McBride, 131 S. Ct. 2630 (2011) 24

Darby v. A-Best Prods. Co., 811 N.E.2d 1117 (Ohio 2004) 28

Davis v. United States, 495 U.S. 472 (1990) 44

Day v. Chicago & N.W. Ry. Co., 188 N.E. 540 (Ill. 1933) 4

Deans v. CSX Transp., Inc., 152 F.3d 326 (4th Cir. 1998) 26

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 45

English v. General Elec. Co., 496 U.S. 72 (1990) 17, 19, 32, 39, 46

Engvall v. Soo Line R.R. Co., 632 N.W.2d 560 (Minn. 2001) 50

Estes v. Southern Pac. Transp. Co., 598 F.2d 1195 (10th Cir. 1979) 26

Fairport, P. & E.R.R. Co. v. Meredith, 292 U.S. 589 (1934) 5

First Sec. Bank v. Union Pac. R.R. Co., 152 F.3d 877 (8th Cir. 1998) 27

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 46

Forrester v. American Dieselelectric, Inc., 255 F.3d 1205 (9th Cir. 2001) 27

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) 48

General Motors Corp. v. Kilgore, 853 So. 2d 171 (Ala. 2002) 28

Gilvary v. Cuyahoga Valley Ry. Co., 292 U.S. 57 (1934) 4

Herold v. Burlington N., Inc., 761 F.2d 1241 (8th Cir. 1985) 50

Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707 (1985) 19

Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197 (1991) 42

Hines v. Davidowitz, 312 U.S. 52 (1941) 31, 46

Holfester v. Long Island R.R. Co., 360 F.2d 369 (2d Cir. 1966) 25

Howlett v. Birkdale Shipping Co., 512 U.S. 92 (1994) 10

Industrial Accident Comm'n v. Payne, 259 U.S. 182 (1922) 4

John Crane Inc. v. Atwell, No. 10-272 (U.S. Nov. 1, 2010) 15

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 32

Kelley v. Southern Pac. Co., 419 U.S. 318 (1974) 43

King v. Southern Pac. Transp. Co., 855 F.2d 1485 (10th Cir. 1988) 50

Kurns v. Airco, 986 A.2d 1293 (Pa. Super. Ct. 2009) 12

Law v. General Motors Corp., 114 F.3d 908 (9th Cir. 1997) 27, 31

Lorincie v. Southeastern Pennsylvania Transp. Auth., 34 F. Supp. 2d 929 (E.D. Pa. 1998).....31, 37

Lyle v. Atchison, T. & S.F. Ry. Co., 177 F.2d 221 (7th Cir. 1949)..... 25

Malone v. St. Louis-San Francisco Ry. Co., 213 S.W. 864 (Mo. Ct. App. 1919)..... 4

Marshall v. Burlington N., Inc., 720 F.2d 1149 (9th Cir. 1983)..... 27-28, 31, 51

McGinn v. Burlington N.R.R. Co., 102 F.3d 295 (7th Cir. 1996)..... 51

McGrath v. Consolidated Rail Corp., 136 F.3d 838 (1st Cir. 1998)..... 26

Mickelson v. Montana Rail Link, Inc., 999 P.2d 985 (Mont. 2000)..... 28

Missouri, K. & T. Ry. Co. v. Orton, 73 P. 63 (Kan. 1903)..... 3

Mosco v. Baltimore & Ohio R.R., 817 F.2d 1088 (4th Cir. 1987)..... 50

Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605 (1926).....13, 14, 17, 34, 36, 37, 38, 40, 41

New Orleans & N.E.R.R. Co. v. Beard, 90 So. 727 (Miss. 1922)..... 4

New York, C. & St. L.R.R. Co. v. Kelly, 70 F.2d 548 (7th Cir. 1934).....24, 25

New York, N.H. & H.R.R. Co. v. New York, 165 U.S. 628 (1897)..... 3

New York Cent. R.R. Co. v. White, 243 U.S. 188 (1917)..... 4

Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135 (2003) 43

Oglesby v. Delaware & Hudson Ry. Co., 180 F.3d 458 (2d Cir. 1999) 27

Pennsylvania State Police v. Suders, 542 U.S. 129 (2004) 10

Pinkham v. Maine Cent. R.R. Co., 874 F.2d 875 (1st Cir. 1989) 26

PLIVA, Inc. v. Mensing, 131 S. Ct. 2567 (2011) **23, 39**, 45, 47

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) **19, 20, 32**, 40, 41

Richmond & D.R.R. Co. v. Elliott, 149 U.S. 266 (1893) 3

Scheiding v. General Motors Corp., 993 P.2d 996 (Cal. 2000) 28

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) 20

Shanks v. Delaware, L. & W.R.R. Co., 239 U.S. 556 (1916) 4

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) **34, 39**, 43

Southern Ry. Co. v. OSHRC, 539 F.2d 335 (4th Cir. 1976) 33

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) **38, 39**, 40, 48

Springston v. Consolidated Rail Corp., 130 F.3d 241 (6th Cir. 1997) 27

Steer v. Burlington N., Inc., 720 F.2d 975 (8th Cir. 1983) 26

Swoboda v. Union Pac. R.R. Co., 127 N.W. 215 (Neb. 1910) 3

Texarkana & Ft. S. Ry. Co. v. O'Kelleher, 51 S.W. 54 (Tex. Civ. App. 1899) 3

Tipton v. Atchison, T. & S.F. Ry. Co., 298 U.S. 141 (1936) 5, 24, 49

Tisneros v. Chicago & N.W. Ry. Co., 197 F.2d 466 (7th Cir. 1952) 26

Trinidad v. Southern Pac. Transp. Co., 949 F.2d 187 (5th Cir. 1991) 26

United States v. Locke, 529 U.S. 89 (2000) 20, 22, 41, 42

Urie v. Thompson, 337 U.S. 163 (1949) 24, 25, 39, 49

West Virginia Asbestos Litig., In re, 592 S.E.2d 818 (W. Va. 2003) 28

Wright v. Arkansas & Missouri R.R. Co., 574 F.3d 612 (8th Cir. 2009) 26, 27

Wyeth v. Levine, 129 S. Ct. 1187 (2009) 15, 31, 44, 46, 47

STATUTES

Act of Mar. 2, 1893, ch. 196, 27 Stat. 531 3

Act of Mar. 2, 1903, ch. 976, 32 Stat. 943 3

Act of Apr. 14, 1910, ch. 160, 36 Stat. 298 3

Act of Feb. 17, 1911, ch. 103, 36 Stat. 913 (Boiler Inspection Act) 4

§§ 1-9, 36 Stat. 913-16 5

§ 1, 36 Stat. 913 ..... 5, 8, 28-29

§ 2, 36 Stat. 913-14 ..... 4, 5, 8, 21, 29

§ 3, 36 Stat. 914 ..... 5, 6, 8

§ 4, 36 Stat. 914 ..... 5, 6, 8

§ 5, 36 Stat. 914-15 ..... 5, 8

§ 6, 36 Stat. 915-16 ..... 5, 8

§ 7, 36 Stat. 916 ..... 5, 8

§ 8, 36 Stat. 916 ..... 5, 8

§ 9, 36 Stat. 916 ..... 5, 8, 29

Act of Mar. 4, 1915, ch. 169, § 1, 38 Stat. 1192, 1192 4

Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745 8

§ 7(b), 108 Stat. 1380 30

Department of Transportation Act, Pub. L. No. 89-670, § 6(e)(1)(E), (G), (f)(3)(A), 80 Stat. 931, 939, 940 (1966) 6

Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* 2, 3, 4, 5, 11, 12, 18, 24, 32, 42, 43

45 U.S.C. § 51 43

45 U.S.C. §§ 53-54 24

Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971 ..... 6, 7, 17, 19, 33

§ 101, 84 Stat. 971 7

§ 202(a), 84 Stat. 971 7

§ 203, 84 Stat. 972 7

§ 205, 84 Stat. 972 7

§ 208(a), 84 Stat. 974 7
§ 208(c), 84 Stat. 975 7
§§ 209-210, 84 Stat. 975-76 7
49 U.S.C. § 20101 *et seq.* 2
49 U.S.C. § 20101 7
49 U.S.C. § 20103(a) 7
49 U.S.C. § 20104 7
49 U.S.C. § 20105 33
49 U.S.C. § 20106(a)(2) 7, 33
49 U.S.C. § 20107(a)-(b) 7
49 U.S.C. § 20108(a)-(b) 7
49 U.S.C. §§ 20111-20112 7
49 U.S.C. § 21301 *et seq.* 2
49 U.S.C. § 21302 30
49 U.S.C. § 21302(a) 30
Interstate Commerce Act, ch. 104, 24 Stat. 379 3
Locomotive Inspection Act, 49 U.S.C. § 20701 *et seq.* ..... *passim*
49 U.S.C. § 20701 ..... 4, 5, 8, 13, 16, 21, 22, 35
49 U.S.C. § 20701(1) 4, 22, 30, 35, 50, 51
49 U.S.C. § 20701(2) 22, 30
49 U.S.C. § 20701(3) 22
49 U.S.C. § 20702 8
49 U.S.C. § 20702(a)(2)-(3) 22
49 U.S.C. § 20702(a)(3) 30
49 U.S.C. § 20702(b)(3) 22

49 U.S.C. § 20702(c) 23

49 U.S.C. § 20703 .....8, 23, 30

Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* 33

29 U.S.C. § 653(b)(4)..... 33

Ports and Waterways Safety Act of 1972, 33 U.S.C. § 1221 *et seq.* 41

Rail Safety Enforcement and Review Act, Pub. L. No. 102-365, § 9(a)(8), 106 Stat. 972, 978 (1992) 29-30

Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, 102 Stat. 624 29

§ 14, 102 Stat. 632-33..... 30

§ 14(7)(A), 102 Stat. 633..... 29

§ 14(7)(B), 102 Stat. 633..... 29

Reorganization Act of 1949, ch. 226, 63 Stat. 203..... 6

Safety Appliance Act, 49 U.S.C. § 20301 *et seq.* .....*passim*

49 U.S.C. §§ 20301-20306 3

49 U.S.C. § 20302(a)..... 23

28 U.S.C. § 1254(1) 2

45 U.S.C. § 11 (1934) 24

45 U.S.C. §§ 22-34 (1988) 5

45 U.S.C. § 23 (1988) 30

45 U.S.C. §§ 24-27 (1988) 6

EXECUTIVE MATERIALS

Special Message to the Congress Transmitting *Reorganization Plan 3 of 1965: Locomotive Inspection* (May 27, 1965), *reprinted in* 45 U.S.C. § 22 note (1988) 6

LEGISLATIVE MATERIALS

H.R. Rep. No. 61-1974 (1911) 29

H.R. Rep. No. 91-1194 (1970) 8

S. 236, 61st Cong. (1909) 29

S. Rep. No. 91-619 (1969) 8

ADMINISTRATIVE MATERIALS

Inspection of Locomotive Boilers: Report of the Commission to the Senate, 73 I.C.C. 761 (Aug. 29, 1922) 23

Policy Statement, Railroad Occupational Safety and Health Standards, 43 Fed. Reg. 10,583 (Mar. 14, 1978) 33

Reorganization Plan No. 3 of 1965, 30 Fed. Reg. 9351 (July 28, 1965) 6

U.S. Dep't of Transp., Fed. Railroad Admin., *Locomotive Crashworthiness and Cab Working Conditions: Report to Congress* (Sept. 1996), *available at* http://www.regulations.gov/#!documentDetail;D=FRA-2004-17645-0009 ..... 10, 48, 49

OTHER MATERIALS

Br. for Def. in Error, *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926) (Nos. 310 & 311) 37

Br. for the United States as Amicus Curiae, *John Crane Inc. v. Atwell*, No. 10-272 (U.S. filed May 6, 2011) 15, 20, 23, 30, 33, 35, 47

Br. of Appellant, *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926) (No. 87) 37

Barry I. Castleman, *Asbestos: Medical and Legal Aspects* (5th ed. 2005) 9, 10

Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767 (1994) 40

Global Env't & Tech. Found., *Asbestos Strategies: Lessons Learned About Management and Use of Asbestos: Report of Findings and Recommendations On the Use and Management of Asbestos* (May 16, 2003) 8, 9

Note, *A Framework for Preemption Analysis*, 88 Yale L.J. 363 (1978) 40

Restatement (Second) of Torts (1965) 47

Irving J. Selikoff & Douglas H. K. Lee, *Asbestos and Disease* (Academic Press 1978) 9

Laurence H. Tribe, *American Constitutional Law* (3d ed. 2000) 40

INTRODUCTION

This case presents one of the most far-reaching assertions of implied field preemption ever rendered by a federal court of appeals. In the decision below, the Third Circuit held that an injured rail repair worker could not bring state-law claims against manufacturers of locomotives and locomotive parts even though the worker's claims did not actually conflict with any federal law or regulation. The Third Circuit's theory was that the Locomotive Inspection Act ("LIA"), enacted in 1911 to make locomotives safer while in "use" on the rails, impliedly preempted the field of state-law claims for failure to warn and design defects against manufacturers for parts that cause injury to workers repairing trains in maintenance shops. That breathtakingly broad judgment extends implied field preemption to claims *outside* the regulatory scope of the federal statute and invokes field preemption to deny claims based on events that occurred decades *before* the defendant-manufacturers even were subject to the federal Act. In addition, implied field preemption ordinarily is appropriate – even within the regulated field – only when Congress has legislated in an area so comprehensively that no other conclusion is warranted or the historical tradition of national control over a subject otherwise dictates federal supremacy. But, here, exactly the opposite is true. State law since the nineteenth century has afforded remedies to workers in railroad repair shops, and the most recent federal rail enactments have disclaimed intent for federal preemption absent explicit promulgation of a federal rule.

If upheld, the Third Circuit's approach would create a massive remedial gap for workers who fall outside the LIA's regulatory protections and who are

unable to invoke the Federal Employers' Liability Act ("FELA") to pursue claims against the railroad. It also creates the further anomaly that railroads held liable under FELA for injuries caused by defective locomotives or locomotive parts cannot turn to the actual wrongdoers – the manufacturers of those products – for contribution or indemnity.

OPINIONS BELOW

The opinion of the court of appeals (App.[1] 1a-21a) is reported at 620 F.3d 392. The opinion of the district court (App. 22a-39a) is not reported (but is available at 2009 WL 249769).

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2010. A petition for rehearing was denied on October 5, 2010. App. 42a. The certiorari petition was filed on January 3, 2011, and granted on June 6, 2011 (JA123). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Locomotive Inspection Act, the Federal Railroad Safety Act of 1970, and the Safety Appliance Act (codified as amended at title 49, subtitle V, part A) are reproduced in the Addendum, *infra*, at 1a-9a.

---

[1] "App. _a" refers to the appendix filed with the certiorari petition, and "JA_" refers to the Joint Appendix filed with this brief.

STATEMENT

A. Legal Background

1. In the late nineteenth and early twentieth centuries, states regularly exercised their police powers to regulate the safety of the railroad industry. *See, e.g., New York, N.H. & H.R.R. Co. v. New York*, 165 U.S. 628, 631 (1897). In particular, state law provided remedies for injured railroad workers and other persons, including those harmed by unsafe locomotives and locomotive parts, as well as those injured during repair work. *See, e.g., Richmond & D.R.R. Co. v. Elliott*, 149 U.S. 266, 271-72 (1893); *Chicago, M. & St. P. Ry. Co. v. Artery*, 137 U.S. 507, 510-11 (1890); *Swoboda v. Union Pac. R.R. Co.*, 127 N.W. 215, 215-16 (Neb. 1910); *Texarkana & Ft. S. Ry. Co. v. O'Kelleher*, 51 S.W. 54, 54-55 (Tex. Civ. App. 1899); *see also Missouri, K. & T. Ry. Co. v. Orton*, 73 P. 63, 63 (Kan. 1903) (per curiam).

During that period, Congress enacted several statutes regulating particular aspects of railroad operations. In 1887, the Interstate Commerce Act, ch. 104, 24 Stat. 379, was passed to regulate the rates charged by railroad carriers. Beginning in 1893, Congress enacted a series of laws, known collectively as the Safety Appliance Act ("SAA"), requiring railroads to maintain certain safety equipment on train cars used on their lines. *See* Act of Mar. 2, 1893, ch. 196, 27 Stat. 531, as amended by Act of Mar. 2, 1903, ch. 976, 32 Stat. 943, as supplemented by Act of Apr. 14, 1910, ch. 160, 36 Stat. 298 (codified as amended at 49 U.S.C. §§ 20301-20306). In 1908, Congress created in FELA a federal cause of action for injured railroad employees against the railroads that employ them. *See* 45 U.S.C. § 51 *et seq.*

In 1911, Congress enacted the Boiler Inspection Act ("BIA"), making it unlawful for common carriers "to use any locomotive engine propelled by steam power in moving interstate or foreign traffic" unless the boiler and its appurtenances were "in proper condition and safe to operate" in "active service." Act of Feb. 17, 1911, ch. 103, § 2, 36 Stat. 913, 913-14 ("1911 Act"). In 1915, Congress amended the BIA to cover not only the boiler but also "the entire locomotive and tender and all parts and appurtenances thereof." Act of Mar. 4, 1915, ch. 169, § 1, 38 Stat. 1192, 1192. As amended, the Act became known as the Locomotive Inspection Act, 49 U.S.C. § 20701 *et seq.* The LIA currently provides that "[a] railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances . . . are in proper condition and safe to operate without unnecessary danger of personal injury." *Id.* § 20701(1).[2]

After the LIA's enactment, state law continued to provide remedies for injured railroad workers (where FELA did not apply) and other persons, including those harmed by unsafe locomotives and locomotive parts, as well as those injured during repair work. *See, e.g.*, *Industrial Accident Comm'n v. Payne*, 259 U.S. 182 (1922); *New York Cent. R.R. Co. v. White*, 243 U.S. 188 (1917); *Shanks v. Delaware, L. & W.R.R. Co.*, 239 U.S. 556 (1916); *Alabama Great S. Ry. Co. v. Hamby*, 192 S.E. 467 (Ga. Ct. App. 1937); *Day v. Chicago & N.W. Ry. Co.*, 188 N.E. 540 (Ill. 1933); *New Orleans & N.E.R.R. Co. v. Beard*, 90 So. 727 (Miss. 1922); *Malone v. St. Louis-San Francisco Ry. Co.*, 213 S.W. 864 (Mo. Ct. App. 1919); *see also Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57 (1934). In

---

[2] Section 20701 is reproduced in its entirety at page 21, *infra*.

addition, injured persons who lacked claims under FELA were permitted to pursue state-created causes of action based on violations of the LIA or the SAA. *See, e.g., Crane v. Cedar Rapids & I.C. Ry. Co.*, 395 U.S. 164, 166-67 (1969); *Tipton v. Atchison, T. & S.F. Ry. Co.*, 298 U.S. 141, 147-48, 151-52 (1936); *Fairport, P. & E.R.R. Co. v. Meredith*, 292 U.S. 589, 598 (1934); *see also infra* note 21.

2. Following a series of subsequent statutory developments, the LIA today plays a fundamentally different role in the federal regulation of railroad transportation than it did in the early twentieth century.

The original LIA, enacted in 1911, consisted of nine substantive provisions. *See* 1911 Act §§ 1-9, 36 Stat. 913-16. Section 1 contained a jurisdictional provision, and § 2 contained the precursor to what is now § 20701 (quoted at p. 21, *infra*). Sections 3 and 4 provided for the appointment of inspectors to enforce the Act. Section 5 required carriers to file rules and instructions for the inspection of locomotive boilers with the chief inspector and provided for review of those rules and instructions by the Interstate Commerce Commission ("ICC"). Section 6 prescribed procedures for inspections. Section 7 required the chief inspector to report annually to the ICC. Section 8 required carriers to report, and an inspector to investigate, any accident caused by failure of a boiler or appurtenance and resulting in serious injury or death. Section 9 provided for civil penalties for violations of the statute, a regulation, or an inspector's order.[3]

---

[3] Initially, the LIA was codified in chapter 1 of Title 45. *See* 45 U.S.C. §§ 22-34 (1988).

In 1965, President Johnson, acting under the authority granted by the Reorganization Act of 1949, ch. 226, 63 Stat. 203, abolished the position of locomotive inspector established under the LIA and transferred the locomotive inspection function to the ICC. *See* Reorganization Plan No. 3 of 1965, 30 Fed. Reg. 9351 (July 28, 1965). In a message to Congress accompanying that reorganization plan, President Johnson explained that the ICC's ability effectively to promote railroad safety was then "severely limited by certain anachronistic provisions of the locomotive inspection statutes." Special Message to the Congress Transmitting Reorganization Plan 3 of 1965: Locomotive Inspection (May 27, 1965), *reprinted in* 45 U.S.C. § 22 note (1988). The LIA, he wrote, "specifies in detail the method of appointing locomotive inspectors, the functions to be performed by them, and the organization structure for administering inspection activities." *Id.* Although those provisions "may have been suited to conditions 50 years ago," President Johnson concluded, "they are clearly inappropriate today." *Id.* In light of those changes, §§ 3 and 4 of the LIA were omitted from subsequent editions of the United States Code. *See* 45 U.S.C. §§ 24-27 (1988). In 1966, Congress transferred authority to implement and enforce the LIA from the ICC to the Federal Railroad Administration ("FRA"), part of the newly created Department of Transportation. *See* Department of Transportation Act, Pub. L. No. 89-670, § 6(e)(1)(E), (G), (f)(3)(A), 80 Stat. 931, 939, 940 (1966).

In 1970, Congress enacted the Federal Railroad Safety Act, Pub. L. No. 91-458, 84 Stat. 971 ("FRSA"), for the purpose of promoting railroad safety and reducing railroad-related accidents and injuries. *See*

id. § 101, 84 Stat. 971 (codified as amended at 49 U.S.C. § 20101). The FRSA established broad federal regulation of railroads, providing that the Secretary of Transportation "shall . . . prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." *Id.* § 202(a), 84 Stat. 971 (codified as amended at 49 U.S.C. § 20103(a)). And it granted the Secretary broad new powers to implement and enforce that mandate.[4] Significantly, even as it transitioned from piecemeal prohibitions to comprehensive regulation, Congress included a section providing that "[a] State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." *Id.* § 205, 84 Stat. 972 (codified as amended at 49 U.S.C. § 20106(a)(2)).

The FRSA's legislative history reflects that, in enacting the statute, Congress recognized the limited nature of the existing federal statutes applicable to railroads. The Senate Report explained that "the railroad industry is the only mode of transportation in the United States which presently is not subject to

---

[4] *See* FRSA § 208(a) ("the Secretary is authorized to perform such acts including, but not limited to, conducting investigations, making reports, issuing subpoenas, requiring production of documents, taking depositions, prescribing recordkeeping and reporting requirements, carrying out and contracting for research, development, testing, evaluation, and training"), (c) (authorizing Secretary's agents to enter and inspect facilities and equipment), 84 Stat. 974, 975 (codified as amended at 49 U.S.C. §§ 20107(a)-(b), 20108(a)-(b)); *id.* § 203 (authorizing emergency orders prohibiting use of unsafe facilities or equipment), 84 Stat. 972 (codified as amended at 49 U.S.C. § 20104); *id.* §§ 209-210 (penalties and injunctive relief), 84 Stat. 975-76 (codified as amended at 49 U.S.C. §§ 20111-20112).

comprehensive Federal safety regulations." S. Rep. No. 91-619, at 1 (1969). The report further found that "scant attention ha[d] been paid to railroad safety at . . . the . . . Federal level[]" and that the existing "rail safety statutes" – including the LIA and the SAA – applied only "to some very specific safety hazard[s]." *Id.* at 4; *accord* H.R. Rep. No. 91-1194, at 8 (1970) (the LIA and other existing railroad safety statutes "meet only certain and special types of railroad safety hazards").

In 1994, the statutes regulating railroad transportation were repealed and partially re-codified in Title 49. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745 ("1994 Act"). A few provisions from the original LIA were re-enacted: § 20701 contains the substantive safety standard and inspection requirements found in § 2 of the original Act; § 20702 contains some of the inspection procedures contained in §§ 5-6; and § 20703 contains the requirement for accident reports and investigations from § 8. Sections 1, 3-4, 7, and 9 of the original LIA – including the provisions governing the appointment of locomotive inspectors and the assessment of civil penalties – were not re-enacted as freestanding provisions.

B. History Of Asbestos Use In Locomotives And Locomotive Parts

This case involves a railroad maintenance worker who became ill and eventually died from exposure to asbestos insulation surrounding locomotive boilers and contained in locomotive brake shoes. Manufacturers in the United States first began using asbestos in the latter half of the nineteenth century.[5] Because

---

[5] *See* Global Env't & Tech. Found., *Asbestos Strategies: Lessons Learned About Management and Use of Asbestos: Report of*

asbestos was noncombustible and resistant to wear, its earliest uses included insulation in steam engines, locomotives, and pipes.[6]

During the period in which it was used in locomotives, asbestos was not a critical component of boiler insulation. Railroads generally used 85 percent magnesia insulation, a material in which asbestos merely acted as a reinforcing fiber and added little to the insulating value of the magnesia.[7] Nor was asbestos the only material suitable for the task: early twentieth century patents reveal numerous alternatives to asbestos such as aluminum, fiberglass, animal hair, and wool.[8]

Despite the available alternatives, locomotive and equipment manufacturers persisted in using asbestos, even after obtaining information about the harms it caused to humans. At least 30 case reports published between 1900 and 1930 indicated that asbestos dust exposure could lead to lung disease and that exposure to the fibrous form of asbestos could thus be an occupational hazard.[9] By 1935, large-scale epidemicological studies showed the link between asbestos exposure and asbestosis.[10] Railroads were familiar with that literature because, throughout the 1930s, reports of the health dangers of asbestos exposure

---

Findings and Recommendations On the Use and Management of Asbestos 33 (May 16, 2003).

[6] *See id.*

[7] *See* Barry I. Castleman, *Asbestos: Medical and Legal Aspects* 372-73 (5th ed. 2005) ("Castleman, *Asbestos*").

[8] *See id.* at 373-74.

[9] *See* Irving J. Selikoff & Douglas H. K. Lee, *Asbestos and Disease* 23 (Academic Press 1978).

[10] *See id.* at 23-24.

were presented at meetings of the Association of American Railroads and were published in railroad claim agent journals.[11]

By the early 1980s, manufacturers had largely ceased using asbestos in locomotives.[12]

C. Factual Background And Procedural History[13]

1. From 1947 to 1974, George Corson worked as a machinist repairing and maintaining locomotives in railroad maintenance facilities. JA42 (¶ 6).[14] His tasks included working with asbestos insulation surrounding locomotive boilers. App. 3a. In particular, Mr. Corson's responsibilities included changing boiler valves, a task that required using a tool to strip the asbestos insulation from the valve, releasing asbestos dust. Mr. Corson also worked alongside pipe fitters and was exposed to asbestos dust created when they removed and replaced asbestos insulation surrounding the boilers themselves. JA56-59, 60-70. The Baldwin Locomotive Company, predecessor-in-interest of respondent Viad Corp ("Viad"), manufactured locomotives on which Mr. Corson worked.

---

[11] *See* Castleman, *Asbestos* at 646-47, 650.

[12] *See* U.S. Dep't of Transp., Fed. Railroad Admin., *Locomotive Crashworthiness and Cab Working Conditions: Report to Congress* 10-11 to 10-12 (Sept. 1996) ("1996 FRA Report"), *available at* http://www.regulations.gov/#!documentDetail;D=FRA-2004-17645-0009.

[13] The Court views the facts in the light most favorable to petitioners, against whom summary judgment was granted below. *See, e.g., Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004); *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 94 (1994).

[14] The Third Circuit erroneously stated that Mr. Corson worked until 1994, rather than 1974. *See* App. 2a.

App. 3a; JA43, 51 (¶¶ 10, 10(at)); JA54-56, 59-60, 63, 72-74.

Another of Mr. Corson's duties was changing locomotive brake shoes. Those brake shoes contained asbestos, and removing them also released asbestos dust. Respondent Railroad Friction Products Corporation ("RFPC") distributed asbestos-containing Cobra brake shoes used by Mr. Corson. App. 3a; JA70-71, 79-82, 86-90, 119-21.

In 2005, Mr. Corson was diagnosed with malignant mesothelioma, the only known cause of which is exposure to asbestos. App. 3a; JA52 (¶ 13). He became severely ill and died from the disease in October 2007. JA72-78, 90-94.

2. In June 2007, Mr. Corson and his wife filed suit in Pennsylvania state court against multiple defendants, seeking damages for injuries caused by his exposure to asbestos. JA41-53. They sued the railroad that employed Mr. Corson under FELA. They also pleaded state-law tort claims against the manufacturers and distributors of the asbestos-containing products with which Mr. Corson worked, including respondents. The Corsons alleged multiple theories of liability, including that those products were defective, both because of their design and because they were not accompanied by adequate warnings regarding the dangers of asbestos or instructions regarding safe use. JA26-27 (¶ 12), 42 (¶ 8). The Corsons also alleged that the manufacturers and distributors were negligent, both in the design of the products and in the failure to furnish proper warnings and instructions. JA20-26 (¶¶ 7-10), 42 (¶ 8). After Mr. Corson's death, the executor of his estate (a petitioner here, along with his widow) was substituted as a plaintiff in the litigation. App. 3a.

In the state trial court, Viad moved for summary judgment on the ground that federal law preempted petitioners' claims. The trial court denied that motion. App. 3a. Subsequently, each of the respondents moved for summary judgment, asserting that insufficient evidence linked its products to Mr. Corson's exposure to asbestos. *Id.* The trial court denied those motions as well. JA100, 101. The court granted, however, motions for summary judgment filed by a number of other defendants, including the railroad for which Mr. Corson worked. With respect to Mr. Corson's FELA claim against the railroad that employed him, the trial court held that there was insufficient evidence of negligence to warrant a trial and that Mr. Corson could not rely on a violation of the LIA to establish negligence because "case law only permits these claims for injuries sustained while on the railroad, but not while in the [repair] shops." JA118.[15]

In May 2008, after the state trial court had granted summary judgment in favor of a defendant whose presence in the case had defeated diversity jurisdiction, respondents removed this case to the United States District Court for the Eastern District of Pennsylvania. App. 4a. In the district court, respondents again moved for summary judgment, each

---

[15] After removal, the federal district court denied petitioners' motions to reconsider the state trial court's orders granting summary judgment to the railroad and other defendants, concluding that it lacked jurisdiction over defendants dismissed by the state court. *See* App. 40a-41a. Petitioners also appealed those orders through the state-court system, and a Pennsylvania intermediate appellate court dismissed the appeal for lack of jurisdiction, on the ground that the removal of the case to federal court divested the state courts of jurisdiction. *See Kurns v. Airco*, 986 A.2d 1293 (Pa. Super. Ct. 2009) (table).

asserting that the LIA preempted petitioners' state-law claims. *Id.* They alleged that petitioners' claims were barred by "field preemption under the Locomotive Inspection Act." JA102; *see* RFPC Br. in Support of Summ. J. at 3 (E.D. Pa. filed Dec. 16, 2008) (asserting "field preemption under the BIA"). Respondents did not argue that petitioners' state-law claims actually conflict with any requirement of federal law.

In February 2009, the district court granted respondents' motions for summary judgment. App. 22a-39a. The court held that the LIA preempts petitioners' claims, relying on *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926). After quoting *Napier*'s conclusion that "'state legislation is precluded because the Boiler Inspection Act, as we construe it, was intended to occupy the field,'" the district court opined that, "because plaintiff alleges that Mr. Corson contracted mesothelioma through his contact with locomotive equipment, the reasoning and holding of *Napier* plainly applies." App. 27a-28a (quoting *Napier*, 272 U.S. at 613).

The district court rejected petitioners' contention that field preemption under the LIA did not bar petitioners' claims because the Act regulates only the conditions under which locomotives can be "used" on a "railroad line," 49 U.S.C. § 20701, and does not address safety hazards presented by the repair process. The court did not dispute the premise that the LIA's coverage is limited to locomotives that are in use on a railroad line, but it opined that "the issue of whether the locomotive was 'in use' or not is inapplicable" because "plaintiff is seeking relief pursuant to state law tort claims and not the BIA." App. 31a. The court further reasoned that, "because the BIA preempts the entire field of locomotive equipment, the

question of whether decedent was exposed to asbestos from locomotives in use or not in use is irrelevant." *Id.* (internal quotation marks omitted). The court's opinion relied entirely on implied field preemption and did not address conflict preemption.

3. The Third Circuit affirmed. App. 1a-21a. The court of appeals read *Napier* to stand for the proposition that "the LIA preempts a broad field relating to the health and safety of railroad workers, including requirements governing the design and construction of locomotives, as well as equipment selection and installation." App. 11a. It opined that "any state law in [the] area" regulated by the LIA is "preempted, regardless of whether the [federal] agency actually exercised [its] powers" under the Act. App. 10a. The court concluded that, because "the brake pads and engine valves that allegedly caused [Mr. Corson's] asbestos exposure . . . are clearly locomotive equipment," petitioners' claims "fall[] squarely within the field of employment hazards that the [LIA] was intended to cover." App. 12a (internal quotation marks omitted; brackets in original).

The Third Circuit rejected petitioners' argument that, because Mr. Corson was exposed to asbestos while servicing locomotives that were not in use, field preemption did not bar petitioners' claims. App. 10a n.5. It acknowledged that the LIA does not apply in such circumstances: "The plaintiffs are correct that *liability* under the LIA only exists if the locomotive was in use at the time of the accident." *Id.* (citing *Crockett v. Long Island R.R.*, 65 F.3d 274, 277 (2d Cir. 1995)). But it reasoned that "[t]his has no impact on the scope of preemption" because "the plaintiffs are not asserting or contesting liability under the LIA." *Id.*

The court of appeals also distinguished *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), on the ground that it involved "implied conflict preemption." App. 11a n.7. The court explained that, "[b]ecause we find that field preemption under the LIA bars the plaintiffs' claims, we need not analyze implied conflict preemption." *Id.* Neither respondent raised conflict preemption in its court of appeals brief; instead, both relied exclusively on the contention that the LIA preempts the relevant field.

4. On January 3, 2011, petitioners petitioned for a writ of certiorari. Approximately two months earlier, on November 1, 2010, this Court had issued an order inviting the Acting Solicitor General to file a brief expressing the views of the United States in another case presenting the question whether the LIA preempts the field of state-law claims involving injuries resulting from repair work on locomotives that were not in use on a railroad line. *See* Order, *John Crane Inc. v. Atwell*, No. 10-272 (Nov. 1, 2010). In May 2011, the United States filed an *amicus* brief in response to the Court's invitation, maintaining that "the field covered by the LIA does not include requirements concerning the repair of locomotives that are not in use." Br. for the United States as Amicus Curiae at 10, *John Crane Inc. v. Atwell*, No. 10-272 (U.S. filed May 6, 2011) ("U.S. *Atwell* Br."). On June 6, 2011, the Court granted the petition in this case.[16]

---

[16] In this brief, petitioners have revised their question presented to track more closely the field-preemption issue that the United States recommended the Court grant review to resolve. *See* U.S. *Atwell* Br. (I).

SUMMARY OF ARGUMENT

I.A. The court of appeals' implied-field-preemption ruling is incorrect and should be reversed. The scope of field preemption is determined by the scope of the regulated field. Petitioners' claims are not within the field regulated by the LIA for two independent reasons.

First, the LIA's purpose is to ensure the safe operation of locomotives on railroad lines, and the Act does not cover locomotives under repair in railroad maintenance facilities. The Act's plain text makes clear that it regulates only the conditions under which a locomotive can be "used" on a "railroad line." 49 U.S.C. § 20701. That reading of the LIA comports with the interpretation of the agency charged with implementing the Act, this Court's precedent interpreting the companion SAA, and a unanimous body of federal court of appeals decisions. Accordingly, because Mr. Corson's injuries were incurred in the course of maintaining locomotives in repair facilities, petitioners' claims are not within any field preempted by the LIA.

Second, during the period in which Mr. Corson was exposed to asbestos by respondents' products, manufacturers of locomotives and locomotive parts were not subject to regulation under the LIA. The Act was first amended to apply to manufacturers such as respondents in 1988, years after Mr. Corson retired from railroad repair work. For that reason as well, petitioners' claims are not within the field regulated or preempted by the LIA.

B. Because states have traditionally provided remedies for injured railroad maintenance workers, respondents would in any event have to demonstrate a "clear and manifest" congressional intent to pre-

empt the field. *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (internal quotation marks omitted). Nothing in the LIA reflects such a clear purpose to abolish state-law personal-injury claims absent an actual conflict with federal law. Subsequent statutory developments have made that conclusion even more apparent: the LIA currently represents only a small part of a larger regulatory regime established by the 1970 FRSA, and the FRSA expressly preserves a role for state safety regulation when there is no federal requirement on point.

C. The Third Circuit's rationale for finding field preemption is erroneous for three reasons. First, although the court acknowledged that the LIA applies only "if the locomotive was in use at the time of" the incident giving rise to the claim, the court incorrectly concluded that the "in use" limitation on the scope of the regulated field had "no impact on the scope of preemption." App. 10a n.5. In fact, the scope of field preemption is determined by the scope of the regulated field. Accordingly, the fact that the LIA does not apply to petitioners' claims means that those claims are not within any field that the Act preempts.

Second, the court's reliance on *Napier* was misplaced. *Napier* involved state legislation requiring railroads to equip their locomotives with particular safety devices before using them on a railroad line. Unlike petitioners' claims – which arise from activities that the LIA does not regulate – the state statutes in *Napier* struck at the heart of the responsible federal agency's regulatory authority under the Act.

Third, the court's implied-field-preemption holding would leave many injured persons without a remedy. For example, under the court's decision, a railroad

repair worker injured by a defective locomotive part would have no claim under state law (which would be preempted) or under the LIA (because the locomotive was not in use at the time of the injury). Although a repair worker employed directly by the railroad would have a cause of action under FELA, that would provide no remedy unless the railroad was negligent as well. Moreover, if the worker did recover damages from the railroad, under the decision below, the railroad would be unable to seek contribution or indemnity from the manufacturer of the injurious product. The Third Circuit made no effort to explain how Congress could have intended such anomalous and harsh results.

II. Because the Third Circuit's implied-field-preemption ruling is incorrect, the judgment should be reversed and the case remanded for further proceedings. Conflict preemption provides no basis for affirming the judgment because it was neither pressed nor passed upon below and is therefore not properly presented here. In any event, to the extent the Court determines that it is appropriate to provide guidance to the lower courts on how to apply conflict preemption under the LIA, claims such as petitioners' do not conflict with the Act or federal regulations.

ARGUMENT

I. IMPLIED FIELD PREEMPTION DOES NOT BAR PETITIONERS' CLAIMS

This Court has held that, even when Congress has not expressly stated its intent to preempt state law, preemption can nonetheless be implied. Federal law impliedly preempts state law, even without an actual conflict between the two, when state law "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English*, 496 U.S. at 79. The doctrine of implied field preemption recognizes two circumstances in which state law is preempted even without a conflict with federal law: (i) when there is a "'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it'" or (ii) when "an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (alterations in original). Here, the Third Circuit relied on the first type of implied field preemption recognized in *English*. *See* App. 16a.[17]

---

[17] The Third Circuit made no finding that the LIA "'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *English*, 496 U.S. at 79 (quoting *Rice*, 331 U.S. at 230) (alteration in original). Nor could it have done so, considering the history of state regulation and remedies in this area and the current conflict-preemption regime established by the FRSA. *See supra* pp. 3-5, 6-7; *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719-20 (1985). This case involves none of the "uniquely federal areas of regulation" – such as foreign affairs and international vessel standards – recognized in this Court's preemption jurispru-

The court of appeals' rationale for finding field preemption, however, is erroneous. Field preemption does not bar petitioners' claims because they are not within the scope of the field regulated by the LIA. Moreover, the Act does not reflect the necessary clear congressional intent to preclude state-law claims absent an actual conflict with federal law.

A. Any Implied Field Preemption Under The LIA Does Not Extend To Petitioners' Claims Because Those Claims Are Not Within The Field Regulated By The Act

This Court's cases make clear that any implied field preemption resulting from a federal statute does not extend beyond the scope of the field the statute regulates. The Court has explained that, in "defining the[] scope" of the federal statute at issue, it would likewise be "defining . . . the scope of the resulting field pre-emption." *United States v. Locke*, 529 U.S. 89, 112 (2000). Similarly, in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), the Court stated that the doctrine of field preemption does not preclude the enforcement of state law unless that law "regulates *within* [the] exclusively federal domain." *Id.* at 305; *see Rice*, 331 U.S. at 237. Viad thus correctly concedes that "the scope of field preemption is determined by the scope of the regulated field." Viad Supp. Cert. Br. 4; *see* U.S. *Atwell* Br. 11, 13.

Petitioners' state-law claims fall outside the field regulated by the LIA in two respects. First, Mr. Corson's illness resulted from his work in rail repair and maintenance facilities, which are not, and never have been, regulated under the LIA. Second, during

---

dence. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1983 (2011) (plurality) (collecting cases).

the period that Mr. Corson was exposed to asbestos, the LIA did not apply to manufacturers of locomotives or locomotive parts, such as respondents.

1. The LIA regulates only locomotives in use on a railroad line

a. The LIA provides in pertinent part as follows:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
>
> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

49 U.S.C. § 20701.

The text and structure of that provision make plain that it applies only to the "use" of a locomotive "on [a] railroad line." *Id.*[18] Those textual limitations on the provision's scope are found in the initial portion of the section, which precedes and qualifies each of the three subsections that follow. *See id.* As a matter of grammar and statutory structure, the section consists of three independent requirements, each addressing the circumstances in which a railroad carrier is permitted to "use or allow to be used a locomotive or tender on its railroad line." *Id.* The LIA thus un-

---

[18] That limitation has existed since the statute's enactment in 1911. *See* 1911 Act § 2, 36 Stat. 913-14.

ambiguously regulates locomotives, tenders, and their parts only when they are in "use" on a "railroad line."

The LIA's principal substantive standard, contained in subsection (1), reinforces the "use" limitation, providing that locomotives must be "in proper condition and safe *to operate*." *Id.* § 20701(1) (emphasis added). The other two subsections of § 20701 likewise address preconditions for the safe *operation* of locomotives – namely, that they "have been inspected as required under" the Act and implementing regulations (subsection (2)) and that they "can withstand every test prescribed by the Secretary" of Transportation under the Act (subsection (3)). By their terms, those provisions do not impose requirements that locomotives must satisfy while in repair facilities. *Cf. Locke*, 529 U.S. at 101, 111 (giving field-preemptive effect to a statute requiring the Coast Guard to issue regulations addressing the "design, construction, alteration, *repair, maintenance*, operation, equipping, personnel qualification, and manning of vessels") (emphasis added).

The remaining provisions of the LIA similarly contain no language authorizing (let alone requiring) the Secretary to regulate hazards posed by the process of repairing and maintaining locomotives. Rather, those provisions direct the Secretary both to inspect locomotives "as necessary" and to "ensure" that carriers also inspect their locomotives and repair any defects "before" a locomotive "is *used* again," 49 U.S.C. § 20702(a)(2)-(3) (emphasis added); provide that a locomotive found by the Secretary to be out of compliance with the Act or implementing regulations "may be *used* only after" it has been repaired and reinspected, *id.* § 20702(b)(3) (emphasis added); require

carriers to maintain reports of their inspections, *see id.* § 20702(c); and require carriers to report, and the Secretary to investigate, locomotive failures causing serious injury or death, *see id.* § 20703. Each of those provisions concerns the safe use of locomotives on railroad lines. None governs the repair process.

The FRA, the agency within the Department of Transportation that currently has authority to implement the LIA, also does not interpret the Act as granting authority to regulate work in repair and maintenance facilities. *See* U.S. *Atwell* Br. 15 ("the LIA does not authorize the FRA to regulate hazards posed by the repair process").[19] And that interpretation of the LIA comports with the longstanding view of the federal agency charged with implementing the Act. Little more than a decade after the LIA's passage, the ICC, which then had authority to administer the Act, determined that "it is the '*use*' of a locomotive not found to be in proper condition and safe to operate, and *not the condition itself*, which is a violation of the law." Inspection of Locomotive Boilers: Report of the Commission to the Senate, 73 I.C.C. 761, 763 (Aug. 29, 1922) (emphases added).

b. This Court has adopted a similar interpretation of parallel language in the SAA, which this Court has construed as a companion to the LIA. *See Brady v. Terminal R.R. Ass'n of St. Louis*, 303 U.S. 10 (1938).[20] In *Brady*, a railroad worker was injured

---

[19] An *amicus* brief filed by the United States represents the views of the relevant agencies. *See, e.g., PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2575 n.3 (2011).

[20] The SAA regulates the conditions under which a railroad carrier "may use or allow to be used on any of its railroad lines" a train car or locomotive. 49 U.S.C. § 20302(a). When *Brady* was decided, the SAA made it unlawful "'to haul[] or permit to

while inspecting one of a series of train cars that another carrier had delivered to his employer. After a suit against his employer under the SAA was dismissed, the worker brought a claim against the delivering carrier under the SAA. *See id.* at 12.[21] This Court explained that "[t]he first question is whether the car can be said to have been in use by the [delivering carrier] at the time in question." *Id.* at 13. It stated that the "'use, movement or hauling of the defective car,' within the meaning of the statute, had not ended when [the worker] sustained his injuries." *Id.* (quoting *Chicago Great W. R.R. Co. v. Schendel*, 267 U.S. 287, 291 (1925)). The Court further explained that it was "not a case where a defective car has reached a place of repair." *Id.* Accordingly, the car the worker was inspecting when he sustained his injuries was "still in use" within the meaning of the statute. *Id.*

Brady cited two cases for the proposition that a car that has "reached a place of repair" is not "in use." *See id.* (citing *Baltimore & Ohio R.R. Co. v. Hooven*, 297 F. 919, 921, 923 (6th Cir. 1924); *New York, C. & St. L.R.R. Co. v. Kelly*, 70 F.2d 548, 551 (7th Cir. 1934)). In each, the court of appeals had held that the SAA did not apply because the injury occurred

---

be hauled or used on its line any car'" lacking certain safety features. *Brady*, 303 U.S. at 12 (quoting 45 U.S.C. § 11 (1934)).

[21] An injured person can rely on the LIA or the SAA to establish liability in an action for damages under state law or under FELA. *See, e.g., Urie v. Thompson*, 337 U.S. 163, 188-89 (1949); *Tipton*, 298 U.S. at 148, 151; *see also supra* pp. 4-5. Under FELA, a violation of the LIA or the SAA establishes negligence *per se* and precludes the railroad from relying on the defenses of contributory negligence and assumption of risk. *See CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2643 n.12 (2011); *Urie*, 337 U.S. at 188-89; 45 U.S.C. §§ 53-54.

when the locomotive was under repair. In *Hooven*, the Sixth Circuit concluded that the SAA does not "cover[]" a locomotive "temporarily withdrawn from service and undergoing minor repairs in roundhouse in preparation for early return to service." 297 F. at 920; *see id.* at 921, 924 (SAA "not applicable" when the locomotive "is withdrawn temporarily from actual service" and "has reached the place of repair"). The Sixth Circuit explained that "the statutory criterion" for determining the SAA's applicability "is whether the car is 'in use' 'on its line.'" *Id.* at 922; *see also id.* ("The act forbids the 'use' or 'hauling on its line' of prescribed cars."). Similarly, in *Kelly*, the Seventh Circuit held that, "[a]fter a defective car reaches the place of repair, the Safety Appliance Act is inapplicable because such car has been withdrawn from service and is not 'in use' under the provisions of the act." 70 F.2d at 550; *see id.* at 551 ("it is clear that Congress in the enactment of the Safety Appliance Act was limiting its operation to cars hauled or permitted to be hauled or used on the line").[22]

c. Every federal court of appeals to have considered the issue has concluded that "[w]hether the LIA applies turns on whether the locomotive was 'in use.'"

---

[22] In light of their similarities, courts of appeals have recognized that both the LIA and the SAA are subject to the same "in use" limitation. *See Holfester v. Long Island R.R. Co.*, 360 F.2d 369, 373 (2d Cir. 1966) ("In view of [the] identity of purpose and the similarity and overlapping of subject matter in dealing with railroad equipment and appliances, the cases defining and construing the phrase 'in use,' for the purpose of the Federal Safety Appliance Act, are authoritative for the same purpose under the Boiler Inspection Act."); *see also Lyle v. Atchison, T. & S.F. Ry. Co.*, 177 F.2d 221, 223 (7th Cir. 1949) (relying on cases under the SAA in holding that the LIA did not apply to a locomotive and tender in an inspection pit); *cf. Urie*, 337 U.S. at 188-89 (interpreting the LIA and the SAA together).

Wright v. Arkansas & Missouri R.R. Co., 574 F.3d 612, 620 (8th Cir. 2009); *see, e.g.*, *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838, 842 (1st Cir. 1998); *Crockett*, 65 F.3d at 277; *Estes v. Southern Pac. Transp. Co.*, 598 F.2d 1195, 1198-99 (10th Cir. 1979); *Tisneros v. Chicago & N.W. Ry. Co.*, 197 F.2d 466, 467 (7th Cir. 1952); *see also Deans v. CSX Transp., Inc.*, 152 F.3d 326, 328-29 (4th Cir. 1998) (interpreting the SAA); *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187, 188 (5th Cir. 1991) (same).

Based on that interpretation of the LIA, the courts of appeals have uniformly determined that the Act does not apply to "injuries directly resulting from the inspection, repair, or servicing of railroad equipment located at a maintenance facility." *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980); *see, e.g.*, *Wright*, 574 F.3d at 615, 622 (locomotive on a "repair in place" track that was "undergoing a daily inspection" "was not 'in use' at the time of the accident"); *McGrath*, 136 F.3d at 842 (citing *Angell*); *Crockett*, 65 F.3d at 277 (train that was "inactive on a yard track" undergoing "light maintenance" not "in use"); *Pinkham v. Maine Cent. R.R. Co.*, 874 F.2d 875, 881 (1st Cir. 1989) ("It is well established that locomotives being serviced in a place of repair are not 'in use' within the meaning of the Boiler Inspection Act."); *Steer v. Burlington N., Inc.*, 720 F.2d 975, 976 (8th Cir. 1983) ("Locomotives being serviced in a place of repair are not 'in use' within the meaning of the Boiler Inspection Act."); *Tisneros*, 197 F.2d at 467 (locomotive in a stall in the roundhouse not "in use").

Although those cases arose in the context of injured persons' attempts to recover for violations of the LIA or the SAA, their holdings apply equally to cases, such as this one, involving assertions that the LIA

preempts the field of state-law claims. The outcomes in those cases turned on the conclusion that the LIA and the SAA do not "appl[y]" when the locomotive is not in use on a railroad line. *Wright*, 574 F.3d at 620; *accord, e.g.*, *Hooven*, 297 F. at 924. Because any implied field preemption under a federal statute does not extend beyond the regulated field, *see supra* p. 20, the LIA does not impliedly preempt the field of state-law claims by workers injured while repairing locomotives that are not "in use" on railroad lines.

Further, as the Third Circuit acknowledged (App. 15a), each of the federal courts of appeals to have considered whether the LIA preempts the field of state-law claims did so in a case in which the injury occurred while the locomotive was in use on a railroad line. *See Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205, 1206-07 (9th Cir. 2001) (plaintiff struck by locomotive crane in use on a track); *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458, 460 (2d Cir. 1999) (per curiam) (railroad worker injured his back when he attempted to adjust an engineer's seat in a locomotive; no indication that the locomotive was not in use on a railroad line); *First Sec. Bank v. Union Pac. R.R. Co.*, 152 F.3d 877, 878 (8th Cir. 1998) (collision between automobile and train at grade crossing); *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 243 (6th Cir. 1997) (same); *Law v. General Motors Corp.*, 114 F.3d 908, 909 (9th Cir. 1997) (railroad workers suffered hearing loss caused by bursts of sound from locomotive brakes and engines); *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1151

(9th Cir. 1983) (Kennedy, J.) (collision between automobile and train at grade crossing).[23]

Accordingly, because the LIA does not apply to locomotives in repair facilities, state-law claims seeking to recover for injuries incurred while working in those facilities are not within any field that the LIA might preempt.

2. The LIA did not apply to manufacturers of locomotives or locomotive parts, such as respondents, when the events giving rise to petitioners' claims occurred

Any implied field preemption under the LIA could not bar petitioners' claims for the additional reason that respondents were not subject to regulation under the LIA at the time Mr. Corson was exposed to asbestos by their products.

As enacted in 1911, the LIA "appl[ied]" only to "common carrier[s]" "engaged in the transportation of passengers or property by railroad" and their "officers, agents, and employees." 1911 Act § 1, 36

---

[23] In addition, none of the state supreme courts to have considered field preemption of state-law claims in this context expressly addressed the applicability of the LIA to locomotives not in use on a railroad line. *See Darby v. A-Best Prods. Co.*, 811 N.E.2d 1117, 1123-26 (Ohio 2004) (not addressing the "in use" limitation); *In re West Virginia Asbestos Litig.*, 592 S.E.2d 818, 821-24 (W. Va. 2003) (same); *General Motors Corp. v. Kilgore*, 853 So. 2d 171, 174-80 (Ala. 2002) (same); *Mickelson v. Montana Rail Link, Inc.*, 999 P.2d 985, 987 (Mont. 2000) (collision between automobile and train at grade crossing); *Scheiding v. General Motors Corp.*, 993 P.2d 996, 1004 n.5 (Cal. 2000) (finding "not timely raised" and declining to "consider" the argument that "the scope of the BIA extends only to the on-line operation of locomotives" and therefore does not preempt claims for injuries "result[ing] from work on [locomotive] equipment in roundhouses and repair shops").

Stat. 913. The Act made it "unlawful" for a "common carrier" or "its officers or agents" "to use" a locomotive unless it was in proper condition and safe to operate. *Id.* § 2, 36 Stat. 913-14. And the LIA subjected "any common carrier violating this Act" to civil penalties. *Id.* § 9, 36 Stat. 916.[24] Thus, as originally enacted, the LIA regulated only railroad carriers and not manufacturers of locomotives or locomotive parts.

Those aspects of the LIA remained essentially unchanged for nearly 80 years. In 1988, the LIA's penalty provision was revised to apply to "[a]ny person (including a railroad and any manager, supervisor, official, or other employee or agent of a railroad) violating" the Act. Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 14(7)(A), 102 Stat. 624, 633 ("1988 Act"). That amendment also added a new sentence to the penalty provision stating that "an act by an individual that causes a railroad to be in violation of any of the provisions of" the Act "shall be deemed a violation." *Id.* § 14(7)(B). In 1992, the Act's penalty provision was amended again to apply explicitly to "[a]ny person (including but not limited to a railroad; any manager, supervisor, official, or other employee or agent of a railroad; *any owner, manufacturer, lessor, or lessee of railroad equipment*, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor)." Rail Safety Enforcement

---

[24] Before the LIA's enactment, Congress considered, but did not pass, bills that would have applied not only to carriers but also to "any seller of a locomotive boiler." S. 236, 61st Cong. § 4 (1909); *see id.* § 2; H.R. Rep. No. 61-1974, at 6-7 (1911).

and Review Act, Pub. L. No. 102-365, § 9(a)(8), 106 Stat. 972, 978 (1992) (emphasis added).[25]

In 1994, the LIA was repealed as part of a comprehensive re-codification of the statutes governing railroad transportation. *See* 1994 Act § 7(b), 108 Stat. 1380. Reenacted portions of the Act apply only to "railroad carriers." *See, e.g.*, 49 U.S.C. § 20701(1)-(2) ("railroad carrier" is required to use only inspected equipment in proper condition); *id.* § 20702(a)(3) (Secretary of Transportation shall ensure that every "railroad carrier" inspects its equipment); *id.* § 20703 (accident reporting requirements for "railroad carrier"). The penalty provision of the Act was not reenacted as part of that re-codification, and the Secretary's authority to impose civil penalties for violations of the LIA is now contained in a section applicable to numerous railroad statutes. *See id.* § 21302. That section provides that "[a]n act by an individual that causes a railroad carrier to be in violation is a violation." *Id.* § 21302(a). According to the United States, that sentence means that "a manufacturer violates the LIA if its products cause a railroad carrier to violate the LIA." U.S. *Atwell* Br. 3.

As that statutory history demonstrates, before 1988, the LIA did not apply to manufacturers of locomotives and locomotive parts, such as respondents. Mr. Corson was exposed to asbestos between 1947 and 1974. *See* JA42 (¶ 6); App. 23a n.1. Because respondents were not subject to regulation under the LIA when Mr. Corson was exposed to asbestos by their products, the doctrine of field preemption does

---

[25] The Act's substantive provisions continued to regulate only railroads. *See, e.g.*, 45 U.S.C. § 23 (1988). (In 1988, the Act was amended to substitute "railroad" for "carrier." *See* 1988 Act § 14, 102 Stat. 632-33.)

not bar petitioners' claims against those manufacturers. *See supra* p. 20 (explaining that any preempted field is coextensive with the regulated field); *Lorincie v. Southeastern Pennsylvania Transp. Auth.*, 34 F. Supp. 2d 929, 932-34 (E.D. Pa. 1998) (holding that the LIA does not preempt claims against manufacturers); *cf. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 508 n.1 (1992) (noting with approval parties' decision not to address the preemptive effect of a statute enacted after the plaintiff's "claims arose"); *Marshall*, 720 F.2d at 1154 (Kennedy, J.) (identifying the relevant question as whether "state regulation was displaced *at the time of the accident*") (emphasis added).[26]

B. The LIA Does Not Reflect A "Clear And Manifest" Congressional Intent To Displace State-Law Claims

This Court has "emphasized" that, when "'the field which Congress is said to have pre-empted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws

---

[26] Unlike field preemption, conflict preemption is not necessarily limited to the regulated field. Thus, for example, if the Secretary of Transportation had issued a regulation under the LIA requiring locomotives to be insulated with asbestos, a state law prohibiting the manufacture of locomotives containing asbestos might have "create[d] an unacceptable 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Wyeth*, 129 S. Ct. at 1193-94 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Such a state law might therefore have been preempted, even though the LIA did not apply to manufacturers. *Cf. Law*, 114 F.3d at 911-12. But the Third Circuit here identified no actual conflict between state law and federal law, and conflict preemption was not even argued below. *See* App. 11a n.7; *see also infra* Part II.A. Conflict preemption accordingly provides no basis on which to affirm the judgment.

must be '"clear and manifest."'" *English*, 496 U.S. at 79 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting in turn *Rice*, 331 U.S. at 230)). That standard applies squarely here. When Congress enacted the LIA in 1911, states played an active role in regulating railroad safety. *See supra* p. 3. Even after the LIA's enactment, states continued to provide remedies for injured persons in circumstances where FELA did not apply. *See supra* pp. 4-5. Accordingly, to establish their field-preemption defense, respondents must demonstrate a "clear and manifest" congressional intent to preclude petitioners' claims. *English*, 496 U.S. at 79 (internal quotation marks omitted).

Even apart from the fact that petitioners' claims are not within the field regulated by the LIA, respondents cannot sustain that burden. The LIA itself says nothing about displacing state-law personal-injury claims. Nor does the Act provide any federal remedy for injuries resulting from violations of its provisions. But injured persons have long relied on the LIA to establish liability under causes of action created by state law or other provisions of federal law (i.e., FELA). *See supra* pp. 4-5 & note 21. That fact severely undermines any assertion that the LIA itself was intended to occupy the field of remedies for workers injured by defective locomotives and locomotive parts.

Moreover, to the extent the current incarnation of the LIA is relevant, the Act as presently constituted hardly represents a "'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *English*, 496 U.S. at 79 (quoting *Rice*, 331 U.S. at 230). Statutory changes in the last half-century

have transformed the LIA into a relatively minor aspect of the broader regulatory regime created by the FRSA. *See supra* pp. 5-8. The FRSA expressly negates any inference of intent to oust state remedies entirely, by providing that existing state law remains effective unless and until a federal regulation on the topic is issued. *See* 49 U.S.C. § 20106(a)(2); *see also id.* § 20105.

Further, the FRA generally has not exercised the expanded authority granted it by the FRSA to regulate rail repair and maintenance facilities. Instead, the safety of employees in those facilities is generally addressed by the Occupational Safety and Health Administration ("OSHA"), whereas the FRA generally focuses on regulating the movement of equipment over rail lines. *See* Policy Statement, Railroad Occupational Safety and Health Standards, 43 Fed. Reg. 10,583, 10,585 (Mar. 14, 1978); U.S. *Atwell* Br. 4, 15.[27] OSHA's governing statute, the Occupational Safety and Health Act of 1970, specifically *preserves* state-law rights and remedies. *See* 29 U.S.C. § 653(b)(4) (Act does not "enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law").

In sum, there is no basis for concluding that Congress has expressed a clear and manifest intent to preempt state-law claims involving injuries to rail repair workers caused by defective locomotives and

---

[27] That was true before 1978 as well. *See Southern Ry. Co. v. OSHRC*, 539 F.2d 335, 338 (4th Cir. 1976) ("[T]he Department of Transportation and FRA do not purport to regulate the occupational health and safety aspects of railroad offices or shop and repair facilities.").

locomotive parts, absent an actual conflict with federal law.[28]

C. The Third Circuit's Field-Preemption Ruling Is Erroneous

The Third Circuit's reasoning supporting its field-preemption holding is incorrect, for three reasons. First, the court of appeals erroneously concluded that petitioners' claims were subject to field preemption even though those claims are based on injuries arising during repairs to locomotives that were not in use. Second, the court's reliance on *Napier* to preclude petitioners' claims was misplaced. Third, the court's ruling unjustifiably deprives injured persons of the right to seek recourse from manufacturers of unsafe products.

1. The Third Circuit erroneously concluded that the "in use" limitation on the LIA's regulatory scope does not affect the scope of field preemption under the Act

The Third Circuit acknowledged that the LIA does not apply when, as here, the locomotives at issue were not "in use at the time of" the incident giving rise to the claim. App. 10a n.5. But the court thought that the "in use" limitation on the scope of

---

[28] *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) ("We do not suggest that there could never be an instance in which the federal law would pre-empt the recovery of damages based on state law. But insofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.").

the regulated field had "no impact on the scope of preemption." *Id.* The court provided no authority for that counterintuitive proposition. In fact, as demonstrated above, this Court's cases are to the contrary. *See supra* p. 20. Indeed, Viad functionally confesses error in the judgment below when it concedes that "the scope of field preemption is determined by the scope of the regulated field." Viad Supp. Cert. Br. 4. Because the scope of field preemption is coextensive with the scope of the regulated field, the fact that the LIA does not regulate the repair process means that state-law claims arising from that process are not within any preempted field.

Viad argued at the certiorari stage that the LIA's "in use" limitation applies only to the substantive standard in § 20701(1) and not to the FRA's regulatory authority under other provisions of the Act. *See id.* at 4-5. But the "in use" limitation applies to all three subsections of § 20701, and the remaining provisions of the LIA likewise address requirements for the *use* of a locomotive on a railroad line. *See supra* Part I.A.1.a. Viad identifies nothing in the LIA's text mandating exclusive federal regulation of the conditions under which a locomotive or its parts can be repaired. Moreover, the Department of Transportation and the FRA have explained that "the LIA does not authorize the FRA to regulate hazards posed by the repair process." U.S. *Atwell* Br. 15. Respondents' defense of the Third Circuit's holding thus rests on the highly dubious proposition that the agency charged with implementing the LIA has misapprehended its regulatory authority.

2. The Third Circuit erroneously relied on *Napier*

The Third Circuit relied heavily on this Court's decision in *Napier* in concluding that implied field preemption bars petitioners' claims. *See, e.g.*, App. 16a. But *Napier* is different from this case in multiple relevant respects, and the Court's analysis in that case in fact supports the conclusion that any field preempted by the LIA does not extend to petitioners' claims.

In *Napier*, Georgia and Wisconsin had passed legislation requiring that locomotives used within their respective borders be equipped with particular safety devices. The Georgia statute required "an automatic door to the firebox," and the Wisconsin act required "a cab curtain." 272 U.S. at 607. Railroads in each state brought suit "to enjoin state officials from enforcing, in respect to locomotives used on [their] lines, a state law which prohibits use within the state of locomotives not equipped with the device prescribed." *Id.* The question presented in this Court was "whether the Boiler Inspection Act has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation." *Id.* The Court answered that question affirmatively, explaining that "state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field." *Id.* at 613; *see also id.* at 611 & n.2. The Court based that conclusion on "[t]he broad scope of the authority conferred upon the [ICC]," which it described as including authority "to prescribe the rules and regulations by which fitness for service shall be determined." *Id.* at 612, 613.

Napier does not support the Third Circuit's ruling for three reasons.

First, *Napier* reflects the "in use" limitation on the LIA's regulatory scope. There, the railroads sought to enjoin the enforcement of state laws regulating "locomotives *used on [their] lines*." *Id.* at 607 (emphasis added). And this Court described the question presented as whether the LIA "occupied the field of regulating locomotive equipment *used on* a highway of interstate commerce." *Id.* (emphasis added). In finding the state statutes preempted, the Court relied on the ICC's authority to prescribe rules for determining whether a locomotive is "fit[] *for service*" and "'in proper condition' *for operation*." *Id.* at 612 (emphases added). Nothing in the Court's opinion suggests that the LIA applied to or preempted state-law claims based on injuries arising from work on non-operational locomotives in maintenance facilities.[29]

The Third Circuit read this Court's statement that the ICC's authority under the LIA extended to "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," *id.* at 611, to require field preemption of all "causes of action which *involve*" any of those subjects, App. 16a (emphasis added). But *Napier* addressed whether state legislation requiring locomo-

---

[29] Nor does *Napier* support barring state-law claims against locomotive and equipment manufacturers based on conduct that took place before those parties were subject to regulation under the Act. *See Lorincie*, 34 F. Supp. 2d at 934. The state statutes at issue in *Napier* applied only to railroad carriers. *See* Br. of Appellant at 3-4, *Napier*, *supra* (No. 87) (reproducing Georgia statute in full); Br. for Def. in Error at 3, *Napier*, *supra* (Nos. 310 & 311) (reproducing Wisconsin statute in full).

tives in use on a railroad line to have certain safety equipment impermissibly interfered with the ICC's authority "to prescribe the rules and regulations by which *fitness for service* shall be determined." 272 U.S. at 612 (emphasis added). That was the "field" that the LIA "was intended to occupy," according to *Napier*. *Id.* at 613. *Napier* did not suggest that the LIA preempted the field of state-law claims arising *outside* that field, even if they somehow "involve" locomotives or locomotive parts. Here, petitioners do not allege that respondents were required to include any additional safety equipment on their products to make them fit for service on rail lines.[30]

Second, *Napier* involved state *legislation*, not common-law claims. This Court has recognized on multiple occasions that a preempted field does not necessarily include state common law. For example, in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), the Court held that, even if the Federal Boat Safety Act "occup[ied] the field with respect to state positive laws and regulations," that statute's "structure and framework do not convey a 'clear and manifest' intent to go even further and implicitly pre-empt all state common law relating to boat manufacture."

---

[30] There is no merit to the Third Circuit's suggestion that, unless the LIA preempts the field of state-law claims for injuries caused by exposure to asbestos in maintenance facilities, locomotive "equipment would have to be designed so that it could be changed to fit [state-law] standards as the trains crossed state lines, or adhere to the standard of the most restrictive states." App. 13a-14a. The court made no attempt to explain how a judgment in petitioners' favor on any of their claims could have such an effect. On the contrary, the court reasoned that field preemption bars a claim so long as its "gravamen" is that "the decedent suffered harmful consequences as a result of his exposure to asbestos contained in locomotive parts and appurtenances." App. 13a n.8.

Id. at 69 (quoting *English*, 496 U.S. at 79). The Court recognized that "common-law claims" – "unlike most administrative and legislative regulations" – "necessarily perform an important remedial role in compensating accident victims." *Id.* at 64. It also explained that the desire to "foster[] uniformity," while "undoubtedly important to the industry," was "not unyielding." *Id.* at 70. The Court concluded that, "[a]bsent a contrary decision" by the responsible federal agency, the uniformity concern did not "justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the Act's more prominent objective . . . of promoting boating safety." *Id.*; *see also English*, 496 U.S. at 80-86 (federal statutes occupying the field of nuclear safety did not preempt state-law claim for intentional infliction of emotional distress brought by employee of nuclear operator); *Silkwood*, 464 U.S. at 249-56 (preempted field of nuclear safety did not include claim for punitive damages arising from plutonium discharge by federally licensed nuclear facility).[31]

Here, as in *Sprietsma*, the statute's primary purpose is promoting safety. *See Urie*, 337 U.S. at 191 ("[T]he prime purpose of the Boiler Inspection Act was the protection of railroad employees and perhaps also of passengers and the public at large from injury due to industrial accident. The safety of all those affected by railroading was uppermost in the legis-

---

[31] This is not to say that state common-law claims have no incidental regulatory effect. *Cf.*, *e.g.*, *PLIVA*, 131 S. Ct. at 2573-74, 2577. Rather, the point is that, when a federal statute's primary purpose is promoting safety, a state-law claim that both serves that objective and provides compensation for injured victims is not preempted unless there is an actual conflict with federal law.

lative mind.") (citation omitted); RFPC Br. in Opp. 2. Accordingly, even when the LIA applies, the desire for uniformity should not be held to displace state common-law remedies unless the FRA has reached a "contrary decision" regarding the matter in question. *Sprietsma*, 537 U.S. at 70. In any event, when, as here, the claims at issue do not involve the field regulated by the statute, there is no basis for implying field preemption of state law.

Third, *Napier* must be understood in its historical context. In the pre-New Deal era in which *Napier* was decided, courts generally concluded that, when the federal government decided to regulate a given subject, any state law governing the same area was automatically invalid. *See* Note, *A Framework for Preemption Analysis*, 88 Yale L.J. 363, 375-76 (1978) ("Prior to the 1930s . . . the Court followed the doctrine that national and state regulation were mutually exclusive: once Congress regulated a subject, the states could not regulate it.") (footnote omitted); Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 801-05 (1994); Laurence H. Tribe, *American Constitutional Law* 1195 (3d ed. 2000). As a broader conception of Congress's legislative authority took root, the Court's preemption jurisprudence evolved as well. *See* Gardbaum, 79 Cornell L. Rev. at 806. Instead of concluding that federal preemption of state law was "automatic," the Court imposed "a new requirement that a federal statute would be considered to have taken over a given field only if Congress clearly manifested its intent to do so." *Id.* Thus, by 1947, the Court explained in *Rice* that the states' historical police powers would not be found to have been preempted "unless that was the clear and manifest purpose of

Congress." *Rice*, 331 U.S. at 230. *Napier*'s historical context is a further consideration weighing against extending the decision in that case to bar state-law claims involving conduct that is not subject to regulation under the LIA.

Indeed, the contrast between this case and those modern decisions in which this Court has found implied field preemption is stark. In *United States v. Locke*, for example, this Court carefully distinguished the federal regulatory regimes that gave rise to field preemption from those that supported conflict preemption. Thus, for example, in the field of international vessel standards, "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme" and negating any "beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Locke*, 529 U.S. at 108. The Court stressed that the state "has enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic and is now well established." *Id.* at 99. And it emphasized that the Ports and Waterways Safety Act of 1972 ("PWSA") established two different modes for preemption of state law: field preemption under PWSA Title II, in which Congress "require[d] the Coast Guard to issue regulations" on a range of subjects including "repair" and "maintenance" standards; and conflict preemption under PWSA Title I, in which the Coast Guard permissively issued regulations (but was not required by statute to do so) and state law conflicted with those regulations. *Id.* at 101. In contrast to that longstanding field preemption of vessel "construction, alteration, repair, [and] maintenance" standards applicable to oil tankers under the PWSA,

id., the ICC (and subsequently the FRA) under the LIA was not authorized, let alone *required*, to issue any regulations governing the safety of railroad repair and maintenance.

3. The Third Circuit's decision leaves injured workers without a remedy

The Third Circuit also incorrectly concluded that "railroad industry employees" exposed to asbestos in repair facilities would have recourse under FELA. App. 17a. In fact, the Third Circuit's field-preemption ruling leaves many injured persons and their families without a remedy, under FELA or otherwise.

Under the Third Circuit's ruling, a worker in a railroad maintenance facility injured by a defective locomotive or locomotive part would have no recourse against the manufacturer. The worker would have no claim against the manufacturer (or the railroad that operated the facility) under state law, because (under the decision below) all state-law duties would be preempted by the LIA.[32] Although preemption would not preclude a state cause of action against the manufacturer based on a violation of the LIA, *see supra* pp. 4-5 & note 21, the worker would not be able to establish such a violation, both because the locomotive was not in use when he was injured and because (during the time period at issue here) the LIA did not apply to the manufacturer.

In addition, although FELA provides a railroad employee (such as Mr. Corson) with a cause of action against the *railroad* that employed him, FELA does

---

[32] State workers' compensation laws typically exclude rail workers. *See Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

not provide a cause of action against manufacturers of locomotives or locomotive parts. *See* 45 U.S.C. § 51. Thus, unless the railroad also was negligent (and therefore liable under FELA), a railroad employee would be left without a remedy entirely. Further, under the Third Circuit's rule, a railroad held liable under FELA for an injury to one of its employees caused by a defective locomotive or locomotive part would be unable to seek contribution or indemnity under state law against the manufacturer. *Cf. Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 141 (2003) (FELA "allow[s] a worker to recover his entire damages from a railroad whose negligence jointly caused an injury (here, the chronic disease asbestosis), thus placing on the railroad the burden of seeking contribution from other tortfeasors").[33]

The fact that the Third Circuit's ruling would deprive many injured workers and their families of a remedy for misconduct and negligence provides an additional reason for limiting any implied field preemption under the LIA to the regulated field. *Cf. Silkwood*, 464 U.S. at 251 ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.").

---

[33] Moreover, if the worker was an independent contractor or other non-railroad employee, he would not even have a FELA claim, because FELA provides a cause of action only for railroad employees (and their families). *See Kelley v. Southern Pac. Co.*, 419 U.S. 318, 323-25 (1974).

II. CONFLICT PREEMPTION PROVIDES NO BASIS FOR AFFIRMING THE JUDGMENT

A. Conflict Preemption Is Not Properly Presented Here

The question whether petitioners' claims are preempted because they conflict with the LIA or a regulation implementing the LIA is not properly presented here.

The issue of conflict preemption was neither pressed nor passed upon below. Respondents did not raise conflict preemption in their motions for summary judgment in the district court or in their briefs in the court of appeals. *See supra* pp. 12-15. And neither the district court nor the court of appeals considered conflict preemption. Instead, both lower courts relied on implied field preemption, holding that petitioners' claims were preempted regardless of whether there was any actual conflict with federal law. *See* App. 10a ("any state law in [the] area" regulated by the LIA is "preempted, regardless of whether the [federal] agency actually exercised [its] powers" under the Act), 27a-28a. Indeed, the Third Circuit distinguished *Wyeth v. Levine* on the ground that it involved "implied conflict preemption," whereas this case involves "field preemption under the LIA." App. 11a n.7. The court therefore held that it "need not analyze implied conflict preemption." *Id.*

Because conflict preemption was neither pressed nor passed on below, that issue is not properly presented here, and this Court should not consider it in the first instance. *See, e.g., Davis v. United States*, 495 U.S. 472, 489 (1990) ("Because this argument was neither raised before nor decided by the Court of Appeals, we decline to address it here."); *City of Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989) ("[W]e

decline to determine whether respondent's contention that such a 'custom' existed is an alternative ground for affirmance. The 'custom' claim was not passed on by the Court of Appeals – nor does it appear to have been presented to that court as a distinct ground for its decision. Thus, we will not consider it here.") (citation omitted); *see also Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) ("this is a court of final review and not first view") (internal quotation marks omitted).[34]

Moreover, in this case, practical concerns confirm the propriety of following this Court's usual practice of declining to consider issues in the first instance. Conflict-preemption analysis requires a court "to compare federal and state law" to determine whether they "directly conflict." *PLIVA*, 131 S. Ct. at 2573, 2577. That detailed inquiry is best undertaken with the benefit of considered rulings by the lower courts based on arguments from the parties.[35]

---

[34] That is true regardless of whether the issue could be considered to have been encompassed within the language of the question presented in the petition. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("Although defendant's petition for certiorari presented the question of the District Judge's abuse of discretion in denying defendants costs under Rule 54(d), that question was not raised in the Court of Appeals and is not properly before us."); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Although in her certiorari petition, petitioner challenged this ruling, . . . examination of the record shows that petitioner never raised [the] issue . . . before the Court of Appeals. . . . We [accordingly] decline to [consider it].").

[35] A first step in conducting that analysis would be to determine what state's law applies to petitioners' claims – the law of the forum state (Pennsylvania), the law of the state in which Mr. Corson lived and worked for most of his career (Montana), or another state's law. The fact that no choice-of-law analysis was performed in the lower courts reinforces the conclusion

B. In Any Event, State-Law Claims Based On Exposure To Asbestos In Rail Repair Facilities Do Not Conflict With The LIA

If the Court determines that it is appropriate to provide guidance to the lower courts at this time on how conflict preemption applies under the LIA, the following analysis should govern.

State law is impliedly preempted to the extent that it "actually conflicts" with federal law, *English*, 496 U.S. at 79, either because "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or because state law "creates an unacceptable 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Wyeth*, 129 S. Ct. at 1193-94 (quoting *Hines*, 312 U.S. at 67). In this context, neither failure-to-warn nor design-defect claims "actually conflict[]" with the LIA.

1. Failure-to-warn claims do not conflict with the LIA

State-law claims based on a failure to provide proper warnings and instructions regarding the dangers of asbestos in locomotives and locomotive parts create no "actual[] conflict" with the LIA. *English*, 496 U.S. at 79. Nothing in the LIA or any regulation implementing it addresses such warnings or instructions. The statute and regulations neither prescribed any particular warnings or instructions nor precluded new or additional warnings or instruc-

---

that any conflict-preemption argument that respondents might seek to raise would be unsuitable for resolution in this Court in the first instance. Conflict preemption should be addressed, if at all, on remand, if the lower courts conclude that such an argument has been properly preserved.

tions. *Cf. PLIVA*, 131 S. Ct. at 2577-78 (failure-to-warn claim preempted when federal law prohibited a stronger warning). Absent any federal requirement respecting warnings or instructions regarding asbestos in locomotives and locomotive parts, a state-law claim alleging a failure to provide such a warning or instruction does not conflict with federal law. *See, e.g.*, *Wyeth*, 129 S. Ct. at 1198-99 (no conflict preemption where federal law permitted manufacturer to provide a warning); *see also PLIVA*, 131 S. Ct. at 2581; U.S. *Atwell* Br. 17.

2. Defective-design claims do not conflict with the LIA

Design-defect claims such as petitioners' likewise create no actual conflict with the LIA. Whether based on concepts of strict products liability or negligence, the basic premise of such a claim in this context is that the locomotive boiler or brake shoes were, because of their design, unreasonably dangerous to maintenance workers such as Mr. Corson. *See generally* Restatement (Second) of Torts § 402A (1965).[36] Permitting such a claim to proceed poses no conflict with the federal regime because nothing in the LIA or its implementing regulations contained any federal requirement regarding the use of asbestos in locomotives or locomotive parts.

On the contrary, to the extent the FRA has considered the issue of asbestos in locomotives, it has not chosen to take any regulatory action. In a 1996

---

[36] A manufacturer would not necessarily have been required to eliminate asbestos from its products to avoid being subject to liability under such a claim. For example, it might have been able to package the asbestos insulation differently, so that performing maintenance work did not involve releasing asbestos dust.

report to Congress on working conditions for locomotive cab crews, the FRA discussed in detail the health hazards asbestos presents. *See* 1996 FRA Report at 10-10 to 10-11. It found that, whereas older steam locomotives contained asbestos, that source of asbestos "was eliminated in the 1970's." *Id.* at 10-11. The FRA further found that the two primary manufacturers of locomotives had eliminated asbestos from their new locomotives. *See id.* at 10-11 to 10-12. Having found that the use of asbestos in locomotives had essentially been discontinued, the FRA concluded that, under then-existing conditions, asbestos did not present a sufficient risk to the safe *operation* of locomotives to justify prospective regulations.[37] The agency explained that it did "not feel that further action with respect to the presence of asbestos in locomotive cabs [was] warranted at [that] time." *Id.* at 10-12.[38] The FRA's decision not to take regulatory action on asbestos in 1996 is indistinguishable from the Coast Guard's decision not to require propeller guards on motorboats that this Court held lacked preemptive effect in *Sprietsma*. *See* 537 U.S. at 64-68; *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289-90 (1995).

The context in which this case arises makes a conflict with the LIA particularly unlikely. The LIA's

---

[37] *See* 1996 FRA Report at 10-12 ("While previous locomotive design incorporated the use of asbestos, and older locomotives remaining in service may still contain limited amounts of asbestos, there is no evidence that the presence of asbestos poses a problem to humans or the environment.").

[38] The 1996 FRA Report was expressly limited to addressing working conditions in "locomotive cabs" and safety risks to locomotive "crew[s]." 1996 FRA Report at i. It did not address risks to repair and maintenance workers created by asbestos in locomotives and locomotive parts.

objective is to ensure the safe use of locomotives on railroad lines. The Act does not address hazards posed by the repair process. Asbestos insulation in locomotives and locomotive parts poses a particular danger to repair workers because asbestos is most hazardous when the insulation has been broken or torn, releasing asbestos dust that can be breathed into the lungs.[39] Unlike maintenance workers such as Mr. Corson, the crew of a properly designed locomotive in use on a railroad line (i.e., workers the LIA was enacted to protect) would not necessarily confront that type of hazard in their daily work.

In addition, even a design-defect claim that (unlike petitioners' claims) *does* involve a hazard relating to the operation of a locomotive would not necessarily conflict with the LIA. This Court has recognized in other contexts that a state common-law duty that parallels a federal safety standard does not impose requirements in addition to or different from the federal standard. *See, e.g., Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 447-48 (2005). And there can be no claim that the mere existence of a state remedy for violation of the standards set forth in the LIA impermissibly interferes with the federal scheme. This Court has long approved of injured parties pursuing state-created remedies for violations of the LIA. *See, e.g., Tipton*, 298 U.S. at 150-51; *supra* pp. 4-5 & note 21.[40] Therefore, to the extent that an

---

[39] *See supra* pp. 10-11; *see also* 1996 FRA Report at 10-11 ("Whenever the steam generator was disassembled and the coils had to be removed, the asbestos cement was broken up and removed, releasing asbestos particles which could be inhaled into the lungs.").

[40] *See also Urie*, 337 U.S. at 165-66, 194 (member of locomotive cab crew who developed the pulmonary disease silicosis

injured worker's state-law claim parallels the LIA's safety standard – which requires locomotives and their parts and appurtenances to be "in proper condition and safe to operate without unnecessary danger of personal injury," 49 U.S.C. § 20701(1) – there would be no conflict preemption.

The way in which courts have construed the LIA's safety standard further reduces the risk that a state-law claim paralleling the federal duty would pose an unacceptable obstacle to the federal regime. Cases applying the LIA have long distinguished between claims based on a failure to install an additional safety device that the FRA had not required (such claims cannot be maintained under the Act) and claims based on an actual defect in an existing locomotive part (such claims are permitted).[41] That

---

from inhaling silica dust blown into cabs of running locomotives stated a claim for violation of LIA).

[41] *See, e.g.*, *King v. Southern Pac. Transp. Co.*, 855 F.2d 1485, 1489 (10th Cir. 1988) ("'failure to maintain' claims have been widely recognized as meritorious" but "those claims are entirely different from claims that a railroad is liable for failing to *install additional* safety devices which the Secretary of Transportation has not seen fit to require"); *Mosco v. Baltimore & Ohio R.R.*, 817 F.2d 1088, 1091 (4th Cir. 1987) ("[A] carrier cannot be held liable under the Boiler Inspection Act for failure to install equipment on a locomotive unless the omitted equipment (1) is required by applicable federal regulations; or (2) constitutes an integral or essential part of a completed locomotive."); *Herold v. Burlington N., Inc.*, 761 F.2d 1241, 1245-46 (8th Cir. 1985) (although "the state, through statute or common law, may not require the railroad to install and maintain amber beacons," "once any part or appurtenance is attached to a locomotive, the Boiler Inspection Act requires it be maintained in good repair at all times"); *Engvall v. Soo Line R.R. Co.*, 632 N.W.2d 560, 566-67 (Minn. 2001) ("[A]lthough a fact finder may not decide whether a locomotive part or appurtenance must be equipped with a particular device in order to comply with the requirements

distinction derives from this Court's decision in *Baltimore & Ohio Railroad Co. v. Groeger*, 266 U.S. 521 (1925), which held that a trial court erred in instructing a jury considering a claim under the LIA to decide whether the Act required a particular piece of equipment ("a fusible safety plug"). *Id.* at 531. The Court explained that, although a railroad's "duty" under the Act "to have the boiler in a safe condition to operate so that it could be used without unnecessary peril to its employees was absolute and continuing," the Act "left to the carrier the choice of means to be employed to effect that result." *Id.* at 527, 530.[42] In light of those longstanding principles, a tort claim based on a state-law duty that parallels the LIA's safety standard would not subject a manu-

---

of the LIA, a fact finder may determine the broader question of whether the part or appurtenance was 'in proper condition and safe to operate' without unnecessary danger of personal injury.") (quoting 49 U.S.C. § 20701(1)); *see also McGinn v. Burlington N.R.R. Co.*, 102 F.3d 295, 299 (7th Cir. 1996) ("There are two ways a rail carrier can violate the BIA. A rail carrier may breach the broad duty to keep all parts and appurtenances of its locomotives in proper condition and safe to operate without unnecessary peril to life or limb, . . . or a rail carrier may fail to comply with the regulations issued by the FRA.").

[42] Applying that distinction, the same result could have been reached in *Marshall v. Burlington Northern, Inc.* through application of conflict preemption, as opposed to field preemption. The court in *Marshall* noted that "[t]here is no allegation here that strobe or oscillating lights were attached to the locomotive at the time of the accident, and that Burlington had negligently failed to maintain them. Rather, the allegation is that Burlington was liable for failure to attach strobe or oscillating lights." 720 F.2d at 1152 (Kennedy, J.). *Marshall* thus involved a failure to install an additional safety device that the FRA had not required – precisely the type of claim that courts have held cannot be maintained under the LIA.

facturer to liability for failure to install particular safety equipment that the FRA had not required.

Accordingly, to the extent the Court decides to address conflict preemption under the LIA, it should conclude that failure-to-warn and design-defect claims arising from injuries caused by asbestos in locomotives and locomotive parts do not actually conflict with the LIA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD P. MYERS
ROBERT E. PAUL
ALAN I. REICH
MARY GILBERTSON
PAUL, REICH & MYERS, P.C.
1608 Walnut Street
Suite 500
Philadelphia, PA 19103
(215) 735-9200

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
EMILY T.P. ROSEN
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

August 12, 2011

ADDENDUM

1. 49 U.S.C. § 20101 provides:

§ 20101. Purpose

The purpose of this chapter is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.

2. 49 U.S.C. § 20106 provides:

§ 20106. Preemption

(a) National uniformity of regulation.—(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) Clarification regarding State law causes of action.—(1) Nothing in this section shall be construed to preempt an action under State law seek-

ing damages for personal injury, death, or property damage alleging that a party—

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) **Jurisdiction.**—Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

3. 49 U.S.C. § 20302 provides:

§ 20302. General requirements

(a) **General.**—Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines—

(1) a vehicle only if it is equipped with—

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the

necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if—

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

(b) **Refusal to receive vehicles not properly equipped.**—A railroad carrier complying with sub-

section (a)(5)(A) of this section may refuse to receive from a railroad line of a connecting railroad carrier or a shipper a vehicle that is not equipped with power or train brakes that will work and readily interchange with the power or train brakes in use on the vehicles of the complying railroad carrier.

(c) Combined vehicles loading and hauling long commodities.—Notwithstanding subsection (a)(1)(B) of this section, when vehicles are combined to load and haul long commodities, only one of the vehicles must have hand brakes during the loading and hauling.

(d) Authority to change requirements.—The Secretary may—

(1) change the number, dimensions, locations, and manner of application prescribed by the Secretary for safety appliances required by subsection (a)(1)(B) and (C) and (2) of this section only for good cause and after providing an opportunity for a full hearing;

(2) amend regulations for installing, inspecting, maintaining, and repairing power and train brakes only for the purpose of achieving safety; and

(3) increase, after an opportunity for a full hearing, the minimum percentage of vehicles in a train that are required by subsection (a)(5)(B) of this section to be equipped and used with power or train brakes.

(e) Services of Association of American Railroads.—In carrying out subsection (d)(2) and (3) of this section, the Secretary may use the services of the Association of American Railroads.

4. 49 U.S.C. § 20701 provides:

§ 20701. Requirements for use

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

5. 49 U.S.C. § 20702 provides:

§ 20702. Inspections, repairs, and inspection and repair reports

(a) General.—The Secretary of Transportation shall—

(1) become familiar, so far as practicable, with the condition of every locomotive and tender and its parts and appurtenances;

(2) inspect every locomotive and tender and its parts and appurtenances as necessary to carry out this chapter, but not necessarily at stated times or at regular intervals; and

(3) ensure that every railroad carrier makes inspections of locomotives and tenders and their parts and appurtenances as required by regulations prescribed by the Secretary and repairs every defect that is disclosed by an inspection before a defective locomotive, tender, part, or appurtenance is used again.

(b) Noncomplying locomotives, tenders, and parts.—(1) When the Secretary finds that a locomotive, tender, or locomotive or tender part or appurtenance owned or operated by a railroad carrier does not comply with this chapter or a regulation prescribed under this chapter, the Secretary shall give the carrier written notice describing any defect resulting in noncompliance. Not later than 5 days after receiving the notice of noncompliance, the carrier may submit a written request for a reinspection. On receiving the request, the Secretary shall provide for the reinspection by an officer or employee of the Department of Transportation who did not make the original inspection. The reinspection shall be made not later than 15 days after the date the Secretary gives the notice of noncompliance.

(2) Immediately after the reinspection is completed, the Secretary shall give written notice to the railroad carrier stating whether the locomotive, tender, part, or appurtenance is in compliance. If the original finding of noncompliance is sustained, the carrier has 30 days after receipt of the notice to file an appeal with the Secretary. If the carrier files an appeal, the Secretary, after providing an opportunity for a proceeding, may revise or set aside the finding of noncompliance.

(3) A locomotive, tender, part, or appurtenance found not in compliance under this subsection may be used only after it is—

(A) repaired to comply with this chapter and regulations prescribed under this chapter; or

(B) found on reinspection or appeal to be in compliance.

(c) Reports.—A railroad carrier shall make and keep, in the way the Secretary prescribes by regulation, a report of every—

(1) inspection made under regulations prescribed by the Secretary; and

(2) repair made of a defect disclosed by such an inspection.

(d) Changes in inspection procedures.—A railroad carrier may change a rule or instruction of the carrier governing the inspection by the carrier of the locomotives and tenders and locomotive and tender parts and appurtenances of the carrier when the Secretary approves a request filed by the carrier to make the change.

6. 49 U.S.C. § 20703 provides:

§ 20703. Accident reports and investigations

(a) Accident reports and scene preservation.—When the failure of a locomotive, tender, or locomotive or tender part or appurtenance results in an accident or incident causing serious personal injury or death, the railroad carrier owning or operating the locomotive or tender—

(1) immediately shall file with the Secretary of Transportation a written statement of the fact of the accident or incident; and

(2) when the locomotive is disabled to the extent it cannot be operated under its own power, shall preserve intact all parts affected by the accident or incident, if possible without interfering with traffic, until an investigation of the accident or incident is completed.

(b) Investigations.—The Secretary shall—

(1) investigate each accident and incident reported under subsection (a) of this section;

(2) inspect each part affected by the accident or incident; and

(3) make a complete and detailed report on the cause of the accident or incident.

(c) Publication and use of investigation reports.—When the Secretary considers publication to be in the public interest, the Secretary may publish a report of an investigation made under this section, stating the cause of the accident or incident and making appropriate recommendations. No part of a report may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

7. 49 U.S.C. § 21302 provides:

§ 21302. Chapter 201 accident and incident violations and chapter 203-209 violations

(a) Penalty.—**(1)** Subject to section 21304 of this title, a person violating a regulation prescribed or order issued under chapter 201 of this title related to accident and incident reporting or investigation, or violating chapters 203-209 of this title or a regulation or requirement prescribed or order issued under chapters 203-209, is liable to the United States Government for a civil penalty. An act by an individual that causes a railroad carrier to be in violation is a violation. A separate violation occurs for each day the violation continues.

(2) The Secretary of Transportation imposes a civil penalty under this subsection. The amount of the penalty shall be at least $500 but not more than $25,000. However, when a grossly negligent violation or a pattern of repeated violations has caused an imminent hazard of death or injury to individuals, or has caused death or injury, the amount may be not more than $100,000.

(3) The Secretary may compromise the amount of the civil penalty under section 3711 of title 31. In determining the amount of a compromise, the Secretary shall consider—

(A) the nature, circumstances, extent, and gravity of the violation;

(B) with respect to the violator, the degree of culpability, any history of violations, the ability to pay, and any effect on the ability to continue to do business; and

(C) other matters that justice requires.

(4) If the Secretary does not compromise the amount of the civil penalty, the Secretary shall refer the matter to the Attorney General for collection.

(b) **Civil actions to collect.**—The Attorney General shall bring a civil action in a district court of the United States to collect a civil penalty that is referred to the Attorney General for collection under subsection (a) of this section. The action may be brought in the judicial district in which the violation occurred or the defendant has its principal executive office. If the action is against an individual, the action also may be brought in the judicial district in which the individual resides.

RESPONDENT'S BRIEF

No. 10-879

IN THE

Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,
Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

DANIEL MARKEWICH
ELLEN G. MARGOLIS
AMY KALLAL
MOUND COTTON WOLLAN & GREENGRASS
One Battery Park Plaza
New York, New York 10004
(212) 804-4200
Attorneys for Viad Corp

WALTER DELLINGER
JONATHAN D. HACKER
(Counsel of Record)
jhacker@omm.com
ANTON METLITSKY
JOANNA NAIRN*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted in Massachusetts only*
Attorneys for Viad Corp

(Additional counsel listed on inside cover)

JAMES C. MARTIN
JOHN L. VITSAS
COURTNEY C.T. HORRIGAN
DAVID J. BIRD
ROBERT H. OWEN
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, Pennsylvania 15222
(412) 288-3131

Attorneys for Railroad Friction Products Corp.

QUESTION PRESENTED

Whether the Locomotive Inspection Act, 49 U.S.C. § 20701 *et seq.*, preempts state-law tort claims concerning the design, construction, or material of locomotives or their parts and appurtenances, as this Court held in *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926).

PARTIES TO THE PROCEEDING

Petitioners are Gloria Gail Kurns and Freida E. Jung Corson, named plaintiffs below.

Respondents are Railroad Friction Products Corporation and Viad Corp,* named defendants below.

RULE 29.6 DISCLOSURE

Respondent Railroad Friction Products Corporation is wholly owned by RFPC Holding Corporation, which is wholly owned by Westinghouse Air Brake Technologies, d.b.a. Wabtec Corporation. There is no parent or publicly held corporation owning 10% or more of Westinghouse Air Brake Technologies.

Respondent Viad Corp does not have a parent corporation, and there is no publicly held company that owns 10% or more of its stock.

---

* Although sued as "Viad Corporation," respondent's correct name is "Viad Corp".

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 DISCLOSURE ii

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. Statutory And Regulatory Background 3

B. Factual Background And Procedural History 16

SUMMARY OF ARGUMENT 20

ARGUMENT 25

I. PETITIONERS' CLAIMS ARE PREEMPTED BECAUSE THE LIA OCCUPIES THE FIELD OF LOCOMOTIVE EQUIPMENT REGULATION 25

A. *Napier*'s Field-Preemptive Construction Of The LIA Remains Controlling 26

B. Petitioners' Claims Fall Within The LIA's Regulated Field As Described In *Napier* 30

C. Petitioners' Remaining Arguments Are Without Merit 42

II. TO THE EXTENT PETITIONERS' CLAIMS ARE NOT FIELD PREEMPTED, THEY ARE CONFLICT PREEMPTED 51

A. Petitioners' Design-Defect Claims Are Conflict Preempted 52

TABLE OF CONTENTS
(continued)

Page

B. Petitioners' Failure-To-Warn Claims Are Conflict Preempted 54

C. This Court Should Hold Petitioners' Claims Conflict Preempted If It Rejects Field Preemption 58

CONCLUSION 60

TABLE OF AUTHORITIES

Page(s)

Cases

Ala. Great S. Ry. Co. v. Hamby,
192 S.E. 467 (Ga. Ct. App. 1937) 10

Allen-Bradley Local No. 1111 v. Wis. Empl't Relations Bd.,
315 U.S. 740 (1942) 28

Am. Airlines, Inc. v. Wolens,
513 U.S. 219 (1995) 13

Brady v. Terminal R.R. Ass'n,
303 U.S. 10 (1938) 40

CBOCS West, Inc. v. Humphries,
553 U.S. 442 (2008) 29

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 45

Cook County v. United States ex rel. Chandler,
538 U.S. 119 (2003) 48

Crane v. Cedar Rapids & I.C. Ry. Co.,
395 U.S. 164 (1969) 9

CSX Transp., Inc. v. McBride,
131 S. Ct. 2630 (2011) 4, 40, 49

Darby v. A-Best Prods. Co.,
811 N.E.2d 1117 (Ohio 2004) 9

Day v. Chi. & N.W. Ry. Co.,
188 N.E. 540 (Ill. 1933) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.,
541 U.S. 246 (2004) 43, 44

Fairport, Painesville & E. R.R. Co. v. Meredith,
292 U.S. 589 (1934) 9

Forrester v. Am. Dieselelectric, Inc.,
255 F.3d 1205 (9th Cir. 2001) 8

Frastaci v. Vapor Corp.,
158 Cal. App. 4th 1389 (2007) 34

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985) 3

Geier v. Am. Honda Motor Co.,
529 U.S. 861 (2000) 44

Gen. Motors Corp. v. Kilgore,
853 So. 2d 171 (Ala. 2002) 9, 39

Gilvary v. Cuyahoga Valley Ry. Co.,
292 U.S. 57 (1934) 9, 10

In re W. Va. Asbestos Litig.,
592 S.E.2d 818 (W. Va. 2003) 9, 29

Indus. Accident Comm'n v. Davis,
259 U.S. 182 (1922) 10

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 29

Law v. Gen. Motors Corp.,
114 F.3d 908 (9th Cir. 1997) ..... passim

TABLE OF AUTHORITIES
(continued)

Page(s)

Lilly v. Grand Trunk W. R.R. Co.,
317 U.S. 481 (1943) 5

Malone v. St. Louis-S.F. Ry. Co.,
213 S.W. 864 (Mo. Ct. App. 1919) 10

Marshall v. Burlington N., Inc.,
720 F.2d 1149 (9th Cir. 1983) 13, 39, 46, 47

Maryland v. Louisiana,
451 U.S. 725 (1981) 8

Mickelson v. Mont. Rail Link, Inc.,
999 P.2d 985 (Mont. 2000) 8

N.Y. Cent. R.R. Co. v. White,
243 U.S. 188 (1917) 10

Napier v. Atl. Coast Line R.R. Co.,
272 U.S. 605 (1926) ..... passim

New Orleans & N.E. R.R. Co. v. Beard,
90 So. 727 (Miss. 1922) 10

Norfolk S. Ry. Co. v. Shanklin,
529 U.S. 344 (2000) 44, 45

Norfolk S. Ry. Co. v. Sorrell,
549 U.S. 158 (2007) 4, 30

Oglesby v. Del. & Hudson Ry. Co.,
180 F.3d 458 (2d Cir. 1999) ..... passim

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) ..... passim

Riegel v. Medtronic, Inc.,
552 U.S. 312 (2008) 44, 54

TABLE OF AUTHORITIES
(continued)

Page(s)

S. Ry. Co. v. Lunsford,
297 U.S. 398 (1936) 15, 26, 49

San Diego Bldg. Trades Council v. Garmon,
359 U.S. 236 (1959) 44

Scheiding v. Gen. Motors Corp.,
993 P.2d 996 (Cal. 2000) 9, 39

Schneidewind v. ANR Pipeline Co.,
485 U.S. 293 (1988) 25

Second Employers' Liability Cases,
223 U.S. 1 (1912) 4, 30

Shanks v. Delaware, L. & W. R.R. Co.,
239 U.S. 556 (1916) 10

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984) 52

Sprietsma v. Mercury Marine,
537 U.S. 51 (2002) 45

Springston v. Consol. Rail Corp.,
130 F.3d 241 (6th Cir. 1997) 8, 43

Swift & Co. v. Wickham,
230 F. Supp. 398 (S.D.N.Y. 1964) 5, 28, 50, 52

Tipton v. Atchison, T. & S.F. Ry. Co.,
298 U.S. 141 (1936) 9

United States v. Locke,
529 U.S. 89 (2000) 30, 37

United States v. Tinklenberg,
131 S. Ct. 2007 (2011) 58

TABLE OF AUTHORITIES
(continued)

Page(s)

United Transp. Union v. Foster,
205 F.3d 851 (5th Cir. 2000) 8

United Transp. Union v. Long Island R.R. Co.,
455 U.S. 678 (1982) 3

Urie v. Thompson,
337 U.S. 163 (1949) 8, 15, 20, 40

Wright v. Ark. & Mo. R.R. Co.,
574 F.3d 612 (8th Cir. 2009) 40

Wyeth v. Levine,
129 S. Ct. 1187 (2009) 35

Statutes

28 U.S.C. § 1441 18

45 U.S.C. § 22 note (1988) 11

46 U.S.C. § 3703 37

49 U.S.C. § 20101 ..... 12, 46

49 U.S.C. § 20102 15

49 U.S.C. § 20103 ..... 12, 46

49 U.S.C. § 20106 ..... 12, 13, 47, 48

49 U.S.C. § 20701 ..... passim

49 U.S.C. § 20702 ..... 14, 32, 33, 37

49 U.S.C. § 20703 ..... 14, 37

49 U.S.C. § 21302 15

49 U.S.C. § 21304 15

TABLE OF AUTHORITIES
(continued)

Page(s)

Act of Mar. 2, 1893,
ch. 196, 27 Stat. 531 3

Act of Mar. 2, 1903,
ch. 976, 32 Stat. 943 3

Act of May 30, 1908,
ch. 225, 35 Stat. 476 3

Act of Apr. 14, 1910,
ch. 160, 36 Stat. 298 3

Act of Mar. 4, 1915,
ch. 169, 38 Stat. 1192 5

Act of June 7, 1924,
ch. 355, 43 Stat. 659 5

Act of July 5, 1994,
Pub. L. No. 103-272, 108 Stat. 745 13

Department of Transportation Act of 1966,
Pub. L. No. 89-670, 80 Stat. 931 11

Federal Employers' Liability Act,
45 U.S.C. § 51 *et seq.* 4-5

Federal Railroad Safety Act,
Pub. L. No. 91-458, 84 Stat. 971 (1970) 12

Interstate Commerce Act,
ch. 104, 24 Stat. 379 (1887) 3

Locomotive Inspection Act, Act of Feb. 17,
1911, ch. 103, 36 Stat. 913 ..... passim

Rail Safety Enforcement and Review Act,
Pub. L. No. 102-365, 106 Stat. 972 (1993) 43

TABLE OF AUTHORITIES
(continued)

Page(s)

Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, 102 Stat. 624 42-43

Regulations

49 C.F.R. part 229 41

49 C.F.R. § 229.85 55

49 C.F.R. § 229.113 55

49 C.F.R. part 230 41

Railroad Operational Safety & Health Standards; Termination, 43 Fed. Reg. 10,583 (Mar. 14, 1978) 15-16, 38, 39

Other Authorities

H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104 .....12, 46, 47, 48

Report of the Commission to the Senate, 73 I.C.C. 761 (Aug. 29, 1922) 41

U.S. Dep't of Transp., Report to Congress, Locomotive Crashworthiness & Cab Working Conditions (Sept. 1996) 16

INTRODUCTION

The Locomotive Inspection Act (LIA)—first enacted in 1911 and now codified at 49 U.S.C. § 20701 *et seq.*—delegated to the Interstate Commerce Commission (now to the Secretary of Transportation) responsibility to assure the safety of "the locomotive or tender and its parts and appurtenances." *Id.* § 20701; *see id.* §§ 20701-20703.

In 1926, this Court considered the question whether a state may regulate any aspect of "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," even absent any "conflict" between "the devices required by the State and those specifically prescribed by Congress or the Interstate Commerce Commission." *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 610-11 (1926). The Court's answer was unanimous and unequivocal: "We hold that state legislation is precluded, because the [Locomotive] Inspection Act, as we construe it, was intended to occupy the field." *Id.* at 613.

Napier squarely resolves this case. The decedent George Corson was allegedly injured by locomotive equipment concededly designed and manufactured in compliance with federal regulatory standards. Petitioners allege that the equipment should have been designed and manufactured according to *different* standards prescribed by state tort law, and that respondents should be liable in damages for failing to comply with those standards. The LIA as construed in *Napier* unambiguously precludes that result, as virtually every court to have addressed the issue has held.

Petitioners' principal argument to the contrary relies on the mistaken proposition that the "field" governed by LIA regulation extends only to locomotive equipment *while it is being actively used on the tracks*. They contend that because Corson was injured by federally-compliant locomotive equipment while working in a repair station off-line, the state is free to enforce different or additional requirements, through imposition of tort liability, on the design and manufacture of the locomotive equipment. States may do so, petitioners assert, because the LIA does not generally regulate the health and safety of employees working in repair stations off-line.

Petitioners' argument is a category mistake. *Napier* did not hold, and nobody here contends, that the LIA delegated to the Department of Transportation (DOT) general authority over *employee health and safety in the roundhouse*. What *Napier* holds is that the LIA delegated to DOT pervasive—indeed exclusive—authority over *the design and manufacture of locomotive equipment*. And the design and manufacture of a locomotive does not change depending on its physical location or the purpose of government regulation. Thus, any state rule that would—for whatever reason—mandate or sanction a particular locomotive design falls squarely within the field occupied by the LIA, no matter where the locomotive is when the state's regulatory requirements are applied. Because petitioners' state-law claims necessarily assert that the locomotive equipment Corson worked on should have been designed or manufactured differently, their claims are preempted by the LIA.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

1. *Early Federal Regulation Of Railroad Economics And Safety*

Beginning in the late nineteenth century, Congress concluded "that a uniform regulatory scheme [was] necessary to the operation of the national rail system." *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 688 (1982), *overruled on other grounds*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Accordingly, Congress began to regulate the Nation's rail carriers. The first major federal economic regulation was the Interstate Commerce Act, enacted in 1887. That Act required that railroads could charge only "reasonable and just" rates in interstate commerce. Interstate Commerce Act, ch. 104, § 1, 24 Stat. 379. The Act also established the Interstate Commerce Commission (ICC or Commission) to administer the Act. *Id.* § 11.

Several years later, Congress entered the field of railroad safety regulation. Beginning in 1893, Congress enacted several statutes that collectively would be known as the Safety Appliance Acts (SAA). The SAA set forth specific requirements concerning the equipment of locomotives and rail cars in interstate commerce, and was enforced by the ICC. *See* Act of Mar. 2, 1893, ch. 196, 27 Stat. 531, amended by Act of Mar. 2, 1903, ch. 976, 32 Stat. 943, amended by Act of May 30, 1908, ch. 225, 35 Stat. 476, amended by Act of Apr. 14, 1910, ch. 160, 36 Stat. 298 (codified as amended at 49 U.S.C. §§ 20301-20306).

Congress extended federal regulation of railroad safety with the Federal Employers' Liability Act

(FELA), 45 U.S.C. § 51 *et seq.*, enacted in 1908. FELA was enacted "[i]n response to mounting concern about the number and severity of railroad employees' injuries," and sought "to provide a compensation scheme for railroad workplace injuries, preempting state tort remedies." *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165 (2007). Although railroad employee safety "was being measurably attained through the remedial legislation of the several States" before FELA's enactment, Congress determined that this state "legislation ha[d] been far from uniform," and that a "national law, operating uniformly in all the States," was required. *Second Employers' Liability Cases*, 223 U.S. 1, 51 (1912). FELA provides railroad employees with a federal damages action for injuries caused by their railroad-employers' negligence. *See CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2636 (2011).

2. *Enactment And Early Interpretation Of The Locomotive Inspection Act*

a. Congress's "mounting concern" about railroad safety also led to the enactment, in 1911, of the Boiler Inspection Act (BIA), later known (and referred to herein) as the Locomotive Inspection Act. Unlike the SAA, in which Congress itself imposed specific equipment requirements on railroads, the LIA for the first time gave the Commission broad authority over railroad safety regulation. *Napier*, 272 U.S. at 608. First reaching only locomotive boilers, Act of Feb. 17, 1911, ch. 103, 36 Stat. 913, the LIA was amended in 1915 to authorize the ICC to assure, through both regulation and inspection, the safety of "the entire locomotive and tender and all parts and

appurtenances thereof." Act of Mar. 4, ch. 169, § 1, 38 Stat. 1192; *see Napier*, 272 U.S. at 608-09.

The LIA served two principal purposes. The first was, as its preamble stated, "[t]o promote the safety of employees and travelers upon railroads." 36 Stat. 913; *see Lilly v. Grand Trunk W. R.R. Co.*, 317 U.S. 481, 486 (1943). The second was to achieve federal uniformity in locomotive safety regulation, thereby avoiding "the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them." *Swift & Co. v. Wickham*, 230 F. Supp. 398, 407-08 (S.D.N.Y. 1964) (three-judge court) (Friendly, J.); *see also* U.S. Br. 23.

The Act accomplished its dual safety and uniformity objectives in two principal ways. One was to impose a federal duty of care directly on rail carriers. Section 2 of the Act, as amended in 1924, made it "unlawful for any carrier to use or permit to be used on its line any locomotive" unless the locomotive and its parts "are in proper condition and safe to operate in the service to which the same are put." Act of June 7, ch. 355, § 2, 43 Stat. 659.

The other was to delegate to the Commission regulatory authority of a "broad scope." *Napier*, 272 U.S. at 613. The ICC was given authority over all rail carriers operating in interstate commerce, LIA § 1, as well as "general" authority over "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611, 613; *see* LIA § 6.

Other provisions of the Act facilitated the exercise of the Commission's regulatory authority over

the design and manufacture of locomotive equipment. The LIA thus provided for appointment of a "chief inspector and two assistant chief inspectors," who would "see that the requirements of this Act and the rules, regulations, and instructions made or given hereunder are observed by common carriers subject hereto." LIA § 3. (The Act required the chief inspector to divide the Nation into 50 districts, and the ICC would appoint one inspector per district. LIA § 4.) Section 7 then required the chief inspector to make an annual report to the ICC, while § 8 required the chief inspector to investigate accidents and, upon the request of the ICC, create a written report.

The Act also delegated specific functions to the chief inspector and ICC concerning inspection and repair of locomotives. Section 5, for example, required carriers to propose specific rules and regulations that would govern inspection of their locomotives, subject to ICC approval. And § 6 further required district inspectors to conduct inspections of every locomotive and its equipment, and precluded rail carriers that fail inspections or that are otherwise non-compliant with ICC regulations from using their locomotives until proper repairs are made.

Finally, § 9 gave the government an additional enforcement mechanism. It empowered the United States to bring suit against carriers that violated any provision of the LIA, and to recover a civil penalty for those violations.

b. Against this regulatory backdrop, this Court addressed the LIA's preemptive scope in 1926 in *Napier*. Georgia and Wisconsin had attempted to

impose their own particular requirements on the design of locomotives and their parts. 272 U.S. at 607. "The main question" presented was "one of statutory construction"—"whether the [Locomotive] Inspection Act has occupied the field of regulating locomotive equipment used on a highway of interstate commerce." *Id.*

In answering that question, this Court "assumed" each state requirement "to be a proper exercise of its police power," and further "assumed ... there is no physical conflict between the devices required by the State and those specifically prescribed by Congress or the Interstate Commerce Commission; and that the interference with commerce resulting from the state legislation would be incidental only." *Id.* at 610-11 (footnote omitted).

The Court nevertheless found Congress's intention to preempt the state legislation "clearly manifested" (*id.* at 611) in the text, structure, and purpose of the LIA. The "power delegated to the Commission by the [LIA] as amended is a general one. It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Id.* State laws regulating the design and manufacture of locomotives were preempted by the LIA's delegation of that regulatory field to the ICC, the Court emphasized, even though those state laws were *not* "inconsistent" with any actual regulation thus far promulgated by the ICC: the "fact that the Commission has not seen fit to exercise its authority to the full extent conferred has no bearing upon the construction of the Act delegating the power." *Id.* at 613.

The LIA, in short, "was intended to occupy the field." *Id.* at 613. "The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose." *Id.* All state laws "directed to the same subject" and that "operate upon the same object"—i.e., "the equipment of locomotives"—were held preempted. *Id.* at 612.

c. This Court has repeatedly reaffirmed *Napier*'s field-preemption holding. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 747 (1981); *Urie v. Thompson*, 337 U.S. 163, 192 (1949); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Moreover, every federal court of appeals and state court of last resort to have considered the question—save Pennsylvania's—has held that the LIA preempts state statutes and common-law claims regulating locomotive design and manufacture. *See Forrester v. Am. Diesel-electric, Inc.*, 255 F.3d 1205 (9th Cir. 2001) (non-employee product liability action against manufacturer of locomotive cranes); *United Transp. Union v. Foster*, 205 F.3d 851 (5th Cir. 2000) (statute requiring signal devices on engine); *Oglesby v. Del. & Hudson Ry. Co.*, 180 F.3d 458 (2d Cir. 1999) (common-law failure to warn claim against seat manufacturer); *Springston v. Consol. Rail Corp.*, 130 F.3d 241 (6th Cir. 1997) (common-law negligence claim for lack of visual devices); *Mickelson v. Mont. Rail Link, Inc.*, 999 P.2d 985 (Mont. 2000) (common-law claims against railroad concerning locomotive equipment). Claims held preempted by the LIA include "state-law tort claims against the manufactur-

ers of railroad locomotives asserting injury caused by exposure to asbestos contained in railroad locomotives." *Darby v. A-Best Prods. Co.*, 811 N.E.2d 1117, 1125-26 (Ohio 2004); *see In re W. Va. Asbestos Litig.*, 592 S.E.2d 818 (W. Va. 2003); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171 (Ala. 2002); *Scheiding v. Gen. Motors Corp.*, 993 P.2d 996 (Cal. 2000).

d. Petitioners erroneously cite several of this Court's post-*Napier* cases for the proposition that "injured persons who lacked claims under FELA were permitted to pursue state-created causes of action based on violations of the LIA or the SAA." Pet. Br. 5. Not one of the cited cases involved a claim based on a violation of the LIA. Rather, each concerned a claim based on a violation of the SAA. *See Crane v. Cedar Rapids & I.C. Ry. Co.*, 395 U.S. 164, 165 (1969); *Tipton v. Atchison, T. & S.F. Ry. Co.*, 298 U.S. 141, 145 (1936); *Fairport, Painesville & E. R.R. Co. v. Meredith*, 292 U.S. 589, 593-94 (1934); *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57, 59 (1934). No precedent of this Court since *Napier* has allowed a state-law action premised on a violation of the LIA.

Petitioners also assert that other cases from this Court and state courts indicate that, even after enactment of the LIA, "state laws continued to provide remedies for injured railroad workers (where FELA did not apply) and other persons, including those harmed by unsafe locomotive parts." Pet. Br. 4. Petitioners are wrong again. Only two of the many cited cases actually involved the design or manufac-

ture of a locomotive or its materials—the field occupied by the LIA.[1] And neither of those two cases—one of which predates *Napier*—even mentions the LIA, let alone analyzes its preemptive scope. *See Indus. Accident Comm'n v. Davis*, 259 U.S. 182 (1922); *Ala. Great S. Ry. Co. v. Hamby*, 192 S.E. 467, 468 (Ga. Ct. App. 1937). Certainly after it was definitively construed by this Court in *Napier*, the LIA did *not* permit state laws to provide remedies for railroad workers injured because of design or manufacturing defects in locomotive equipment.

3. *Subsequent LIA Amendments And Current Codification*

Petitioners further err in suggesting (Pet. Br. 5-8) that subsequent amendments to the LIA have rendered the statute less important, or have narrowed its delegation of regulatory authority over the design, construction, and material of every locomotive.

a. As petitioners correctly state (Pet. Br. 6), the first major post-*Napier* change to the LIA's regulatory regime occurred in 1965, when President John-

---

[1] *See Gilvary*, 292 U.S. at 59 (SAA claim based on equipment of rail car, not locomotive); *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188 (1917) (no indication that case involved a locomotive); *Shanks v. Delaware, L. & W. R.R. Co.*, 239 U.S. 556, 558 (1916) (injured by a shop fixture, not a locomotive part); *Day v. Chi. & N.W. Ry. Co.*, 188 N.E. 540, 541-42 (Ill. 1933) (injury caused by actions of another employee); *New Orleans & N.E. R.R. Co. v. Beard*, 90 So. 727, 727-28 (Miss. 1922) (negligence claim was based on faulty welding equipment and work conditions); *Malone v. St. Louis-S.F. Ry. Co.*, 213 S.W. 864, 866 (Mo. Ct. App. 1919) (injury caused by a train passing at high speed, which sent debris through the window of the stationary train on which plaintiff sat).

son announced that, under authority of the Reorganization Act of 1949, he would eliminate the position of "chief inspector" created by § 3 of the LIA. Special Message to the Congress Transmitting Reorganization Plan 3 of 1965: Locomotive Inspection (May 27, 1965), *reprinted in* 45 U.S.C. § 22 note (1988). The President explained that "anachronistic provisions of the locomotive inspection statutes"—i.e., provisions creating the chief inspector and his subordinates, and separating his functions from those of the ICC—limited the "Commission's ability to organize and carry out most effectively its responsibilities for railroad safety." *Id.* To remedy this situation, the President transferred all the functions of the chief inspector and his subordinates to the ICC. *Id.*

President Johnson's actions accordingly recognized that while the sections of the LIA creating and setting forth the functions of the chief inspector—§§ 3, 4, and 7—had no continuing significance, the substantive safety regulatory regime created by the LIA remained critical. Indeed, far from lessening the importance of the LIA or of its regulatory regime, the President explained that "[p]rogress in railroad technology has not eliminated the need for locomotive inspection. Locomotive inspection is still essential for the safety of employees, passengers, and cargo." *Id.*

b. The next year, Congress abolished the ICC and delegated its regulatory authority (including its authority under the LIA) to the Secretary of Transportation. Department of Transportation Act of 1966, Pub. L. No. 89-670, § 6, 80 Stat. 931, 939-40.

That statute, however, did not amend the LIA's substance in any way.

c. Shortly thereafter, in 1970, Congress enacted the Federal Railroad Safety Act (FRSA), Pub. L. No. 91-458, 84 Stat. 971 (1970). The FRSA was enacted "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Importantly, Congress determined that the then-existing laws concerning railroad safety—including the LIA—"have served well" and should be "continue[d] ... without change." The problem was that existing laws *did not go far enough*, meeting "only certain and special types of railroad safety hazards." H.R. Rep. No. 91-1194, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4105. Congress therefore expanded federal authority to areas of rail safety not already covered by existing laws, delegating to the Secretary of Transportation authority to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." 49 U.S.C. § 20103(a).

Congress also included a specific preemption provision in the FRSA, which was designed to assure that "[e]xisting state rail safety statutes and regulations remain in force until and unless preempted by federal regulation." H.R. Rep. No. 91-1194, at 24, *reprinted in* 1970 U.S.C.C.A.N. at 4130. The provision states in part that a "State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation ... prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). The same sec-

tion provides that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." *Id.* § 20106(a)(1).

As the foregoing discussion shows, nothing in the FRSA—including its preemption provision—was intended to "subsume, replace, or recodify any acts," including the LIA. *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983) (Kennedy, J.).

d. In 1994, Congress repealed and recodified all of the federal railroad safety statutes, including the LIA, in Title 49. Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. Petitioners suggest that the LIA was only partially reenacted (Pet. Br. 8); in fact, Congress expressly stated in the 1994 act that the recodification was intended to be "without substantive change." *Id.* § 1(a); *see Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 n.1 (1995).

Specifically, the 1994 act recodified LIA § 2—the duty-of-care provision, which also refers to the Secretary's regulatory authority—at 49 U.S.C. § 20701. That provision states:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
>
> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

Congress also recodified the Secretary's inspection authority previously set forth in LIA §§ 5 and 6, including authority concerning locomotive repair. These recodified sections specifically require the Secretary to "(1) become familiar, so far as practicable, with the condition of every locomotive and tender and its parts and appurtenances; (2) inspect every locomotive and tender and its parts and appurtenances as necessary to carry out this chapter ... and (3) ensure that every railroad carrier makes inspections of locomotives ... and repairs every defect that is disclosed by an inspection before a defective locomotive, tender, part, or appurtenance is used again." 49 U.S.C. § 20702(a). And a locomotive that is not in compliance with the Act or DOT regulations may be used "only after it is ... (A) repaired to comply with this chapter and regulations prescribed under this chapter; or (B) found on reinspection or appeal to be in compliance." *Id.* § 20702(b)(3). Congress similarly recodified LIA § 8, which concerns reports and investigations of injuries occurring as a result of locomotive part failures. *Id.* § 20703.

Petitioners state that Congress did not recodify the remainder of the LIA—§§ 1, 3, 4, 7, and 9—"as free-standing provisions." Pet. Br. 8. But those provisions all are embodied fully in current law. As explained, §§ 3, 4, and 7 all concerned the chief inspector of locomotives, whose inspection authorities were fully transferred by President Johnson to the ICC in 1965, and are now exercised by the Secretary of Transportation. *See* 49 U.S.C. §§ 20701-20703. Section 1—which in part defined the scope of the term

"railroad"—is now part of 49 U.S.C. § 20102, which defines that term and others for several different statutes, including the LIA. Finally, § 9—the LIA's penalty provision—was recodified and consolidated with other railroad-safety penalty provisions at 49 U.S.C. §§ 21302 and 21304.

Accordingly, the Secretary today retains the same regulatory authority under the LIA that Congress originally delegated to the ICC and the chief inspector. That authority thus still applies to "[w]hatever in fact is an integral or essential part of a completed locomotive," as well as "all parts or attachments definitely prescribed by lawful order" of the Secretary. *S. Ry. Co. v. Lunsford*, 297 U.S. 398, 402 (1936). It "extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611. And it is not "confined to safeguarding against accidental injury," but also extends to "protection of employee health," insofar as it may be harmed by defective design or manufacture of locomotive equipment. *Urie*, 337 U.S. at 191, 193-94.

4. *Relevant Regulatory History*

In 1978, the Federal Railroad Administration (FRA)—the agency within DOT responsible for regulating railroad safety—promulgated regulations intending to clarify the division of authority between the two federal agencies with responsibility for railroad worker safety issues: the FRA and the Occupational Safety and Health Administration (OSHA), which has general authority over workplace safety pursuant to the Occupational Health and Safety Act of 1970. *See* Railroad Operational Safety & Health

Standards; Termination, 43 Fed. Reg. 10,583 (Mar. 14, 1978). The FRA made clear that it would retain primary worker-safety jurisdiction over—and OSHA would have no jurisdiction over—"the design of locomotives and other rolling equipment used on a railroad, since working conditions related to such surfaces are regulated by FRA as major aspects of railroad operations." *Id.* at 10,587.

In 1996, FRA reported the results of an investigation and rulemaking proceeding mandated by Congress as to the particular question of asbestos in locomotives and their parts. That report, which Congress had required in the event FRA determined not to prescribe regulations, found that "further action with respect to the presence of asbestos in locomotive cabs" was not "warranted at this time." U.S. Dep't of Transp., Report to Congress, Locomotive Crashworthiness & Cab Working Conditions 10-12 (Sept. 1996).[2]

B. Factual Background And Procedural History

1. Between 1947 and 1974, George Corson was employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad, and worked at various locomotive repair facilities in South Dakota and Montana. JA42; Pet. App. 3a. His duties included "removing insulation from locomotive boilers and putting brake shoes on locomotives." Pet. App. 3a. Corson allegedly contracted mesothelioma from his exposure to asbestos

---

[2] *Available at* http://www.regulations.gov/#!documentDetail;D=FRA-2004-17645-0009.

from the insulation and brake shoes. JA52.[3] Respondent Viad is alleged to be the successor in interest of the company that allegedly manufactured the locomotives and boilers, JA51, while respondent Railroad Friction Products Corporation (RFPC) allegedly distributed the brake shoes (i.e., "parts and appurtenances" of the locomotive), JA49.

2. On June 13, 2007, Corson and his wife filed a complaint against numerous defendants, including Viad, RFPC, and Corson's railroad-employer, in Pennsylvania state court, alleging state-law tort claims. JA41-53. In particular, the complaint alleged that the equipment Corson repaired was defective in its design because it contained asbestos. JA20-27 (¶¶ 7-10, 12). The complaint also alleged that the defendants failed to warn Corson of the dangers of asbestos exposure. JA21-26 (¶ 10). Corson passed away during the pendency of the litigation, and the personal representatives of his Estate, Gloria Kurns and Freida Corson, were substituted as party plaintiffs, Pet. App. 3, and are the petitioners here.

Many of the defendants, including respondents Viad and RFPC, moved for summary judgment on various grounds. Both Viad's and RFPC's motions argued that petitioners' state-law claims were pre-

---

[3] Petitioners say that railroads knew of the risks of asbestos exposure by the 1930s. Pet. Br. 9. That contention is, of course, irrelevant for purposes of deciding whether the LIA preempts petitioners' claims. Moreover, the state trial court in this case expressly found that plaintiffs had failed to produce any evidence that Corson's railroad employer was aware of the harms of asbestos at the time of his alleged exposure. JA117-18.

empted by the LIA. JA104-05, JA120-21. The trial court denied Viad's and RFPC's summary judgment motions in a one-sentence order, JA100-01, although it granted summary judgment as to several other defendants on other grounds, *see, e.g.*, JA99, JA118.

3. On May 13, 2008, following the grants of summary judgment to some defendants and the voluntary dismissal of others—including a Pennsylvania corporation whose presence in the case had precluded removal to federal court on the basis of diversity of citizenship, *see* 28 U.S.C. § 1441(b)—Viad and RFPC timely removed the remainder of the case to federal district court. Viad and RFPC again moved for summary judgment on preemption grounds. Pet. App. 4a, 23a-24a.

4. The district court granted the motion for summary judgment, citing *Napier*, *see* Pet. App. 25a-34a, and the Third Circuit affirmed. The court of appeals began with *Napier*, and its "hold[ing] that state legislation is precluded, because the [Locomotive] Inspection Act ... was intended to occupy the field." Pet. App. 10a (quotation and emphasis omitted).

The "goal of the LIA," the court further explained, "is to 'prevent the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them.'" Pet. App. 12a (quoting *Oglesby*, 180 F.3d at 461). "In order to accomplish this goal, suits against manufacturers of locomotive parts for product liability claims should be included in the scope of the LIA's field preemption, particularly because the LIA governs both the design and the construction of a locomotive's parts." Pet. App. 13a. "If each state

had its own standards for liability for railroad manufacturers," the court emphasized, "equipment would have to be designed so that it could be changed to fit these standards as the trains crossed state lines, or adhere to the standard of the most restrictive states." Pet. App. 13a-14a. "Congress's goal of uniform railroad equipment regulation would clearly be impeded by state product liability suits against manufacturers, the purpose of which is, in part, to persuade defendants to comply with a standard of care established by the state." Pet. App. 14a.

The court of appeals also rejected the argument that LIA preemption applies only to state-law claims based on injuries sustained when a locomotive is "in use," and not when it is being repaired. The court explained that while "*liability* under the LIA only exists if the locomotive was in use at the time of the accident," "plaintiffs are not asserting or contesting liability under the LIA." Pet. App. 10a n.5 (emphasis in original).

Finally, the court of appeals rejected petitioners' argument that their claims involving "a failure to place a warning label on some of the products in question" are not preempted because they do "not directly involve the parts and appurtenances [of the locomotive] themselves." Pet. App. 13a n.8. "This is merely an attempt at artful pleading," the court of appeals concluded, because the "gravamen of the plaintiffs' claim is still that the decedent suffered harmful consequences as a result of his exposure to asbestos contained in locomotive parts and appurtenances." *Id.* "The plaintiffs," the court explained, "may not merely rebrand a claim in order to avoid preemption." *Id.* (citing *Oglesby*, 180 F.3d at 461;

Law v. Gen. Motors Corp., 114 F.3d 908, 910-13 (9th Cir. 1997)).

The court of appeals therefore "agree[d] with the vast majority of courts that have been called upon to decide the issue of the scope of LIA preemption," Pet. App. 16a, holding that the LIA "preempts a broad field relating to the health and safety of railroad workers, including requirements governing the design and construction of locomotives, as well as equipment selection and installation." Pet. App. 11a (citing *Napier*, 272 U.S. at 611-12; *Urie*, 337 U.S. at 191-93).

SUMMARY OF ARGUMENT

I. A. This Court held in *Napier* that DOT's broad regulatory authority over locomotive equipment design and manufacture occupies the field, and that any state attempt to regulate the same subject matter is void. That holding squarely decides this case. Because petitioners' state-law tort claims challenge the design and manufacture of locomotive equipment, they are preempted by the LIA, as interpreted in *Napier*.

Contrary to petitioners' submission, *Napier* is fully consistent with modern field-preemption doctrine, which requires a clear finding of congressional intent to occupy the field. *Napier*'s holding rests on its explicit conclusion that Congress "clearly manifested" its intent to preclude state regulation of the design, construction, and materials of locomotive equipment. 272 U.S. at 611. And nothing in the intervening period has undermined *Napier*'s tacit recognition that a uniform national standard governing locomotive equipment is necessary for the efficient

movement of locomotives in interstate commerce. If there were some policy reason to amend the LIA and effectively overrule *Napier*, Congress could have done so, but it has not.

B. There likewise is no merit to petitioners' argument that LIA field preemption applies only to regulation of locomotive design while the locomotives are "in use" on the tracks, not while they are in repair stations, where their design injured Corson. That argument relies entirely on the LIA's duty-of-care provision, which requires railroads to assure the safety of on-line locomotives. But that provision does not mark the boundary of the LIA's regulatory—and hence preemptive—scope. In addition to imposing a duty of care on railroads, the Act *also* confers on DOT *categorical* authority to regulate the design and manufacture of locomotive equipment. A locomotive's design and manufacture is the same whether it is on the tracks or in the roundhouse. Accordingly, DOT's broad authority to regulate locomotive design necessarily preempts state laws that purport to regulate locomotive design only in the roundhouse.

Petitioners observe that the LIA does not grant DOT general authority to regulate the health and safety of railroad repair workers. That is true but irrelevant. What matters is that the LIA *does* grant DOT authority to regulate locomotive design and manufacture, and that authority necessarily applies wherever the locomotive happens to be at the time the plaintiff's injury is incurred.

C. Petitioners' remaining arguments against field preemption are similarly misplaced. Petition-

ers note that the LIA's civil penalty provision was amended to reach manufacturers only after Corson alleged he was exposed to asbestos. But as the government explains in rejecting that argument, LIA preemption is based on DOT's exclusive regulatory authority over locomotive design and manufacture, not on the parties designated as defendants by the statute.

Petitioners also err in contending that LIA preemption encompasses only positive state regulation, not tort law. No court has ever adopted that position. Sanctions under state tort law have the same effect on the regulation of locomotive equipment design and manufacture as sanctions under state statutes or regulations. And allowing individual juries to regulate locomotive design or manufacture through liability awards would undermine the LIA's national-uniformity objective as much as, if not more than, state positive regulation.

Petitioners additionally contend that the LIA's significance—and, thus, its preemptive force—has been diminished since *Napier* in light of the FRSA. The government correctly rejects that argument as well. The FRSA was expressly enacted to *supplement*, not alter or replace, then-existing railroad safety statutes, including the LIA. Congress made the conscious decision to continue the LIA in force without amendment, thus retaining its preemptive effect over locomotive-equipment design and manufacture.

Finally, petitioners contend that their construction of LIA preemption is necessary to avoid leaving certain potential plaintiffs without a remedy for in-

juries caused by alleged locomotive equipment design and manufacturing defects. But the only claims foreclosed would be claims by *independent contractors* asserting *off-line* injuries, and most of those would be foreclosed anyway under the conflict preemption theory espoused by the government. Petitioners point to nothing suggesting that preserving such a small category of claims was among Congress's objectives in enacting the LIA. And while they profess concern that railroads held liable under FELA could not sue manufacturers for contribution, nothing would preclude railroads and manufacturers from privately contracting *ex ante* for indemnification. In any event, that some claimants could be left without a remedy is a necessary consequence of field preemption, and it is no reason to depart from *Napier*'s construction of the regulatory scheme or to undermine the LIA's requirement of national uniformity.

II. The government contends that while field preemption under the LIA is limited to regulation of on-line locomotives, any state tort claim implicating locomotive design would nevertheless be *conflict* preempted because such a claim would interfere with Congress's purpose and objective of national uniformity in locomotive-equipment regulation. The government's conflict-preemption argument is just a semantic recharacterization of the longstanding LIA field preemption rule: a state-law claim for an off-line injury interferes with the LIA's national uniformity objective precisely because the LIA grants DOT *categorical* authority to establish a single, uniform standard for all aspects of locomotive design

and manufacture, whether the locomotive is on- or off-line.

A. If the Court holds that petitioners' claims are not field preempted, however, it should hold they are conflict preempted. As the government acknowledges, petitioners' design-defect claims seek directly to challenge the design of respondents' locomotive equipment, which squarely interferes with the LIA's purpose of uniformity in locomotive-equipment regulation.

B. The government errs, however, in contending that failure-to-warn claims do not similarly interfere with the LIA's uniformity purpose. Courts have consistently held that there is no relevant distinction for LIA purposes between a state's judgment that a locomotive design is unsafe, on the one hand, and a state's judgment that a locomotive is unsafe absent a warning, on the other. DOT's own warning regulations recognize that authority to regulate design and manufacture necessarily encompasses authority to regulate warnings. And the specter of 50 different, and potentially conflicting, state warning requirements is as much of a threat to the LIA's overriding purpose of uniform regulation of locomotive equipment as direct state regulation of locomotive design would be.

C. The question of conflict preemption is ripe and should be resolved, but only if the Court rejects the longstanding and nearly uniform precedents of the federal and state appellate courts and holds that LIA field preemption applies only to the design and manufacture of locomotives when they are actively in use on-line.

ARGUMENT

Petitioners treat this Court's decision in *Napier* as little more than an afterthought—it is not even mentioned in the Argument section of their brief until page 36. But *Napier*'s construction of the LIA, applied consistently by federal courts and the overwhelming majority of state courts for more than 80 years, squarely controls the outcome in this case. The court of appeals correctly adhered to *Napier* and concluded that petitioners' tort claims are preempted by the LIA because they seek to regulate the design, construction, or material of locomotive equipment. Petitioners' attempts to place this case outside the scope of the LIA—despite *Napier*'s longstanding, controlling construction of the Act—are without merit. The judgment of the court of appeals should be affirmed.

I. PETITIONERS' CLAIMS ARE PREEMPTED BECAUSE THE LIA OCCUPIES THE FIELD OF LOCOMOTIVE EQUIPMENT REGULATION

In the absence of an express preemption provision, Congress nevertheless "may indicate an intent to occupy a given field to the exclusion of state law." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). Congress's intent to exclude state law from a particular subject of regulation "properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where 'the object sought to be obtained by the federal law and the character of obligations imposed by it ... reveal the same purpose.'" *Id.* (quoting

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), in turn citing *Napier*).

This Court held in *Napier* that the LIA "clearly manifested" Congress's intent to "occupy the entire field of regulating locomotive equipment." 272 U.S. at 611. Petitioners' tort claims indisputably seek to regulate the design and manufacture of locomotive equipment. They therefore fall squarely within the field regulated by the LIA, and are preempted for that reason.

A. *Napier*'s Field-Preemptive Construction Of The LIA Remains Controlling

1. The question presented in *Napier* was the same one petitioners present here: "[W]hether the [LIA] has occupied the field of regulating locomotive equipment used on a highway of interstate commerce." 272 U.S. at 607. The answer to that question, then as now, is yes. This Court explained that the LIA "was intended to occupy the field" of regulation concerning the "design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," irrespective of whether any federal safety standard is "inconsistent with the state legislation." 272 U.S. at 611, 613; *see also S. Ry. Co.*, 297 U.S. at 402. Accordingly, all state laws "directed to the same subject" and that "operate upon the same object"—i.e., "the equipment of locomotives"—are preempted. 272 U.S. at 612.

Petitioners here plainly seek to hold Viad and RFPC liable based on claims challenging the design, construction, and material of the locomotive and its parts. Their claims thus are preempted by the LIA

as construed in *Napier*, as the court of appeals correctly held.

2. Petitioners suggest that *Napier* should not be applied to their claims at all because it represents an anachronistic approach to preemption, one that cannot be reconciled with or survive current doctrine. That argument is incorrect.

a. Although the petition for certiorari urged this Court to overrule *Napier* (Pet. 36-40), petitioners have not expressly renewed that request, *see* U.S. Br. 12 n.3, and the United States expressly asserts that *Napier* retains its full vitality, *e.g.*, U.S. Br. 12-13. Petitioners do suggest, however, that *Napier* should be understood as limited to a "historical context" that no longer exists. Pet. Br. 40. Petitioners argue that when *Napier* was decided, "courts generally concluded that, when the federal government decided to regulate a given subject, any state law governing the same area was automatically invalid." *Id.* That view of preemption changed after the New Deal, petitioners contend, to an approach reflected in this Court's statement in *Rice* that state laws "would not be found to have been preempted 'unless that was the clear and manifest purpose of Congress.'" Pet. Br. 40-41 (quoting *Rice*, 331 U.S. at 230). Petitioners say that *Napier* is at odds with the manifest-congressional-purpose approach to preemption adopted in *Rice*, and so *Napier* must be ignored.

Petitioners' "historical context" argument distorts both *Napier* and *Rice*. Consistent with current preemption doctrine, *Napier* expressly holds that the "intention of Congress to exclude States from exerting their police power must be *clearly manifested*,"

and further holds under this standard that the LIA "was intended to occupy the field." 272 U.S. at 611, 613 (emphasis added). Petitioners' submission that the LIA does not reflect a "clear and manifest" intent to displace state-law claims (Pet. Br. 31-34) ignores *Napier* itself. And when *Rice* observes that a finding of preemption requires a "clear and manifest purpose of Congress," the first case *Rice* cites for that proposition is *Napier*—though petitioners omit the citation. *Rice*, 331 U.S. at 230 (citing *Napier*, 272 U.S. at 611, and *Allen-Bradley Local No. 1111 v. Wis. Empl't Relations Bd.*, 315 U.S. 740, 749 (1942)). *Napier* cannot be inconsistent with the very proposition for which *Rice* cites it.[4]

b. Nor has the underlying rationale for preempting the field of locomotive-equipment design and manufacture changed since *Napier* was decided. As Judge Friendly observed, *Napier*'s field preemption holding was animated by "the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them." *Swift*, 230 F. Supp. at 407-08. The same concern holds true today: "Locomotives are designed to travel long distances, with most railroad routes wending through interstate commerce. The virtue of uniform national regulation is self-evident: locomotive companies need only con-

---

[4] In any event, if petitioners were correct that this Court's precedents at the time required a finding of field preemption whenever Congress enacted a federal law regulating a particular subject, then the Congress that enacted the LIA necessarily accepted that federal regulation concerning locomotive design, construction, and material would exclude all state regulation on that subject.

cern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state." *Law*, 114 F.3d at 910 (quotation omitted). By contrast, if each state were permitted "to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined." *Id.* at 910-11. There is no plausible reason national uniformity in locomotive-equipment regulation should be deemed less important now than it was when the LIA was enacted or *Napier* was decided.

c. Finally, whatever *Napier*'s "historical context," its construction of the LIA's preemptive scope remains entitled to "special force," because Congress at any point could have amended the LIA to revise its preemptive effect. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008); *see CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008). But Congress has not altered the LIA in any relevant way since *Napier* was decided in 1926. *See supra* at 10-15. Accordingly, manufacturers have designed and manufactured locomotives and their equipment for more than eight decades relying on *Napier*'s clear holding that their designs and materials needed to comply only with a single, uniform set of standards, clearly prescribed by federal regulations manufacturers could easily find and apply. That understanding has been repeatedly affirmed by an "avalanche of [lower court] authority" applying *Napier*, *W. Va. Asbestos Litig.*, 592 S.E.2d at 822,

and holding that because only DOT may prescribe standards governing the design and manufacture of locomotive equipment, state regulatory requirements concerning the same subject—including tort claims based on the use of asbestos in locomotive equipment—are preempted. *See supra* at 8-9.

Napier remains correct on its own terms, but if there were any doubts, they must be resolved in favor of adhering to precedent, given its especially strong "statutory *stare decisis*" force.[5]

B. Petitioners' Claims Fall Within The LIA's Regulated Field As Described In *Napier*

As petitioners and the government correctly acknowledge, the extent of field preemption is coterminous with the scope of the regulated field. *See United States v. Locke*, 529 U.S. 89, 112 (2000); Pet. Br. 20; U.S. Br. 13. Petitioners and the government argue that even under *Napier*, the LIA does not pre-

---

[5] The jurisprudential and regulatory havoc that would result from overruling *Napier* on petitioners' theory would not be limited to the LIA. Since 1912, this Court has held that FELA occupies the field of railroad workplace injuries, and thus displaces state tort remedies for railroad workers against their employers. *See Second Employers' Liability Cases*, 223 U.S. at 53-55; *see also Sorrell*, 549 U.S. at 165. This Court's preemption analysis in *Second Employers' Liability Cases* resembled the "automatic" preemption approach that petitioners erroneously ascribe to *Napier*. *See* 223 U.S. at 55 ("And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."). If *Napier* were overruled as inconsistent with *Rice*'s "clear and manifest intent to preempt" approach, then FELA preemption would necessarily fall as well, and along with it every railroad's century-old reliance on a single, uniform tort regime for its employees.

empt petitioners' claims because those claims fall outside the scope of the regulated field *Napier* identified. They contend that the LIA permits DOT to regulate locomotive equipment only while the locomotive is actively "in use," and not while it is being repaired in a roundhouse, where Corson was allegedly exposed to asbestos. Pet. Br. 21-28; U.S. Br. 13-22. As a result, "state-law claims seeking to recover for injuries incurred while working in [repair] facilities are not within any field that the LIA might preempt." Pet. Br. 28; *see* U.S. Br. 12-22.

Petitioners and the government misconstrue both *Napier* and the LIA. As *Napier* holds, DOT's authority under the LIA extends *categorically* to regulation of the design, construction, and materials of locomotive equipment. That authority does not cease to exist merely because the locomotive enters a roundhouse for repairs. Indeed, it is difficult to imagine how regulation of locomotive design and manufacture limited to on-line locomotives would function, since a locomotive can change neither its design nor manufacture when it rolls into a repair station. Petitioners' claims are preempted because they seek to regulate locomotive equipment, which is squarely within the scope of DOT's regulatory authority under the LIA.

1. In arguing that the LIA's regulatory field extends only to locomotive equipment that is actively "in use," petitioners and the government focus exclusively on the LIA provision establishing a duty of care for railroads. That provision states that "[a] railroad carrier may *use* or allow to be used a locomotive or tender *on its railroad line* only when the locomotive or tender and its parts and appurte-

nances ... are in proper condition and safe *to operate* without unnecessary danger of personal injury." 49 U.S.C. § 20701(1) (emphasis added). The emphasized terms, petitioners and the government argue, demonstrate that the statute governs only locomotives actively being used on-line, and not locomotives that have been taken off-line for repairs. Pet. Br. 21-22; U.S. Br. 13-14.

The duty of care in locomotive operation imposed on railroads, however, does not fully capture the field regulated by the LIA. In order to ensure that locomotives are safely operated, the LIA *also* delegates to DOT the authority to regulate *locomotive equipment itself*. DOT is required to:

- "become familiar, so far as practicable, with the condition of every locomotive tender and its parts and appurtenances,"
- "inspect every locomotive and tender and its parts and appurtenances," and
- "ensure that every railroad carrier makes inspections of locomotives and tenders and their parts and appurtenances ... and repairs every defect that is disclosed by an inspection before a defective locomotive, tender, part, or appurtenance is used again."

49 U.S.C. § 20702(a).

In other words, whereas the railroad duty of care precludes *railroads* from using unsafe equipment, DOT is additionally charged with ensuring that manufacturers do not even *build* (and railroads do not buy) unsafe locomotives in the first instance. DOT's duties concerning off-line locomotives are "not

merely to inspect" them, but also include the authority "to specify the sort of equipment to be used on locomotives" and "to require specific devices." *Napier*, 272 U.S. at 612. DOT's authority thus necessarily extends to inspecting locomotive equipment and ensuring its safe design and manufacture, regardless where the locomotive happens to be sitting—on- or off-line—at a given moment. Indeed, a locomotive may enter a repair shop for the specific purpose of being inspected or repaired to ensure compliance with DOT regulations. *See* 49 U.S.C. § 20702(b) (requiring that locomotives comply with statute and regulations before use on-line). DOT's authority over locomotive equipment is *enforced* in the roundhouse, not *suspended*.[6]

What petitioners and the government fail to appreciate is that a locomotive's design and construction are the same whether the locomotive is in use or not. Of necessity, the design, construction, and ma-

---

[6] Petitioners and the United States rely on several statements in *Napier* concerning the use or operation of locomotives, believing that those statements support the proposition that DOT's regulatory authority under the LIA only extends to locomotives "in use." *E.g.*, *Napier*, 272 U.S. at 607 (describing state laws as regulating "locomotives used on [their] lines"); *id.* at 612 (stating that ICC has authority to prescribe rules for determining whether a locomotive is "fit[] for service" and "'in proper condition' for operation"); *see* Pet. Br. 37; U.S. Br. 16-17. But these statements merely demonstrate the obvious—that the LIA's regulatory concern (and hence DOT's authority) is directed toward *operational locomotives*. DOT does not, for example, have authority under the LIA to regulate the design of a locomotive resting in a museum, or even one that is used exclusively in the railyard. But that limit on DOT's authority has no relevance here, because it is undisputed that Corson repaired locomotives for use on the line.

terials of locomotive equipment are first determined off-line, before any locomotive is put to use on a railroad line. Nothing about the design, construction, and materials of locomotive equipment changes when it goes on-line, or returns to the repair station. *Napier* thus properly recognized that the "subject" of DOT's regulatory power is "the equipment of locomotives," *id.*, and that the LIA "occup[ies] the *entire field of regulating locomotive equipment*," *id.* at 611 (emphasis added)—not just the field of locomotive equipment *while it is being operated*. *See, e.g.*, *Frastaci v. Vapor Corp.*, 158 Cal. App. 4th 1389, 1399-1403 (2007) (collecting cases and holding that LIA preempts field of locomotive equipment regulation regardless whether locomotive is "in use" or not).

2. The government, in fact, does not actually disclaim DOT authority to regulate locomotive equipment once it enters the roundhouse. To the contrary, the government concedes that DOT has general authority to prescribe rules governing the design and manufacture of locomotives, and that "any particular locomotive subject to the safety rules promulgated by the Secretary pursuant to the LIA will inevitably come in and out of use over time." U.S. Br. 17.[7]

---

[7] Petitioners contend that DOT believes it has no regulatory authority over repair-process hazards, and that respondents' preemption argument here "thus rests on the highly dubious proposition that the agency charged with implementing the LIA has misapprehended its regulatory authority." Pet Br. 35. But as explained, DOT fully agrees that "the Secretary may prescribe safety rules governing 'the design, the construction, and the material of every part of the locomotive and tender and

The government nevertheless contends that the LIA's regulatory field should be understood as limited to locomotive equipment actively being used because the *reason* the LIA gives DOT authority to regulate such equipment—whether on- or off-line at a given moment—is to ensure that locomotives are safely operated when they are on-line. U.S. Br. 17-18.

This Court rejected a virtually identical argument in *Napier*. There, the states argued that their laws were outside the scope of the LIA because they were "aimed at distinct and different evils": whereas the LIA sought "to prevent accidental injury in the operation of trains," the state laws sought "to prevent sickness and disease due to excessive and unnecessary exposure." 272 U.S. at 612. This Court held that the difference in statutory objectives was irrelevant: the LIA and the state laws occupied the same field because they were "directed to the same subject—the equipment of locomotives. They operate upon the same object." *Id.* In other words, the scope of regulation—and hence preemption—under the LIA was determined not by the Act's regulatory objective, but by "the physical elements affected by

---

of all appurtenances.'" U.S. Br. 17 (quoting *Napier*, 272 U.S. at 612). The government's disagreement with respondents is not over whether the LIA delegates to DOT authority to prescribe rules concerning, for example, the use of asbestos in locomotives, but rather over the effect of that delegation of authority on the LIA's preemptive scope. A federal agency's view of the preemptive scope of the statute it administers is not entitled to deference even when stated in a regulatory preamble, *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009), let alone in an amicus brief.

it." *Id.* Because the state laws were regulating the same physical elements, the laws were "precluded, however commendable or however different their purpose." *Id.* at 613.

The government here makes the same mistake the states made in *Napier*. It is irrelevant that DOT regulation of locomotive equipment under the LIA is ultimately aimed at securing safe locomotive operation, in contrast to the employee-health objectives underlying petitioners' state-law claims. Either way, both regulatory regimes pursue their objectives by regulating the same physical object—the design and manufacture of locomotive equipment. Under the LIA as construed in *Napier*, the fact that DOT is given authority over that subject to permit fulfillment of federal locomotive safety objectives does not permit a state to impose its own laws governing the same subject merely because the state has a different reason for imposing them. Whatever its purpose, any state regulation directed at the object of LIA regulation—locomotive equipment design and manufacture—is preempted.

The government demonstrates its own error by arguing that while off-line claims challenging the design, construction, or material of a locomotive are not *field* preempted, they are *conflict* preempted because allowing such claims to go forward would frustrate a central objective of the LIA—national uniformity in locomotive safety standards, including design and material requirements. U.S. Br. 23-24. But to the extent a conflict exists, it is because the LIA accomplishes that objective by making DOT the exclusive source of legal standards governing locomotive design, construction, and material, irrespec-

tive of whether the locomotive happens to be "in use" at the time a legal standard is applied. The government's correct observation that a state law regulating locomotive design in repair shops conflicts with the LIA thus defeats its argument that the LIA's regulatory field does not extend to locomotives in repair shops.

3. Petitioners make a slightly different analytical mistake. They argue that the LIA duty-of-care provision, as well as other provisions—e.g., requirements concerning locomotive inspection and provisions precluding the use of locomotives that fail to meet safety standards until they are repaired, 49 U.S.C. §§ 20701(2) & (3), 20702-20703—only "concern[] the safe use of locomotives on railroad lines," and do not "govern[] the repair process." Pet. Br. 23. Petitioners contrast the LIA with the statute held to be field-preemptive in *Locke*, which delegated to the Coast Guard the authority to regulate not only the "design" and "construction" of certain maritime vessels, but also the "repair" and "maintenance" of the vessels. Pet. Br. 22 (quoting *Locke*, 529 U.S. at 101, in turn quoting 46 U.S.C. § 3703(a)). If Congress wanted to delegate to DOT the authority to regulate the repair and maintenance of locomotives, petitioners maintain, Congress would have said so explicitly, as it did in the *Locke* statute.

That argument confuses the regulation of underlying equipment design and manufacture itself with the regulation of the conditions under which that equipment is repaired and maintained. It is true that the LIA does not delegate DOT authority to generally regulate the repair and maintenance of locomotives. If it did, DOT would have power under

the statute to prescribe the design of repair facilities, the type of equipment repair facilities can use, the conditions under which they may operate, and so on. DOT does not have that authority under the LIA—that power is conferred on DOT by the FRSA. What the LIA *additionally* delegates to DOT is power to regulate *all aspects* of the design, construction, and materials of locomotive equipment—"the entire field of regulating locomotive equipment," as *Napier* put it. 272 U.S. at 611. It is nonsensical to say that DOT can determine lawful locomotive design, but then say that a state can overrule DOT and mandate a different design because the state believes the DOT-approved design may cause injury during the repair and maintenance process.

FRA drew exactly this distinction between regulation of equipment design and regulation of the repair process in 1978, when it clarified the respective regulatory authority over railroad worker safety of FRA and OSHA. *See supra* at 15-16. Although FRA decided that it would cede most aspects of railroad worker health and safety regulation to OSHA, *see* Railroad Operational Safety & Health Standards; Termination, 43 Fed. Reg. 10,583 (Mar. 14, 1978), it specifically retained primary worker-safety jurisdiction over "the *design of locomotives* and other rolling equipment used on a railroad," *id.* at 10,587 (emphasis added).[8] Because petitioners' claims concern "the

---

[8] Petitioners' statement that FRA has "generally" not exercised its authority "to regulate rail repair and maintenance facilities" repeats the mistake described in the text. Pet. Br. 33. Even leaving aside *Napier*'s point that preemption in this context is determined by the *existence* of regulatory power, rather than the *exercise* of that power, 272 U.S. at 613, what matters

design of locomotives," they fall squarely within the field regulated by the LIA, and are thus preempted.[9]

Petitioners make another analytical error in asserting that the Third Circuit below relied for its field-preemption holding on the pervasiveness of federal regulation in *the field of locomotive safety*. Pet. Br. 19 (citing *Rice*, 331 U.S. at 230). In fact, the court of appeals relied on the dominant federal interest—identified in *Napier*—in regulating *locomotive design and manufacture*. Pet. App. 16a. The basis for field preemption under *Napier* is not the quantitative pervasiveness of federal locomotive safety regulations. It is, rather, the regulatory "object sought to be obtained" by the LIA and "the character of obligations imposed" by the LIA, which together demonstrate Congress's belief that the "federal interest" in regulating the design of locomotive equipment is "dominant." *Rice*, 331 U.S. at 230 (citing *Napier*).

---

here is not whether FRA has authority under the LIA to regulate *repair and maintenance facilities*, but whether FRA has authority to regulate *locomotive-equipment design*. And as explained above, FRA expressly stated that it does have that authority, and thus would continue to exercise jurisdiction over rail-worker safety as it concerns "the design of locomotives." 43 Fed. Reg. at 10,587.

[9] This point applies equally to petitioners' design-defect and failure-to-warn claims. As explained below, *infra* at 54-58, both claims challenge the design or manufacture of locomotive equipment. Thus, both design and warning claims, as courts have uniformly held, fall within the LIA's field preemptive scope. *See, e.g.*, *Oglesby*, 180 F.3d at 461; *Law*, 114 F.3d at 911; *Marshall*, 720 F.2d 1149; *Kilgore*, 853 So. 2d 171; *Scheiding*, 993 P.2d at 1004.

4. For reasons similar to those already discussed, cases brought under FELA against railroads for violations of the LIA's duty of care do not capture the full field regulated by the LIA. Pet. Br. 23-27; U.S. Br. 15 & n.5. Nor can those cases be invoked to narrow that field. As explained, FELA permits an injured railroad worker to recover compensatory damages from his employer (i.e., the railroad, not the locomotive equipment manufacturer) when the employer's "negligence played any part in bringing about the injury." *CSX*, 131 S. Ct. at 2634. A worker can establish "negligence per se" under FELA by proving that the railroad violated the duty of care prescribed by the LIA or other rail safety statutes, like the SAA. *Urie*, 337 U.S. at 189. This Court has held that a plaintiff could recover under FELA by showing a violation of the SAA if he was injured while the train was "in use." *Brady v. Terminal R.R. Ass'n*, 303 U.S. 10, 13 (1938). And in FELA claims based on violations of the LIA, the courts of appeals have relied on *Brady* to hold that a railroad is per se liable only when the injury was sustained when the locomotive was "in use." Pet. Br. 25-27; U.S. Br. 15 n.5 (citing cases). (The railroad remains liable for its own negligence under FELA irrespective of whether the employee's injury occurred on- or off-line. *See, e.g., Wright v. Ark. & Mo. R.R. Co.*, 574 F.3d 612, 614 (8th Cir. 2009).)

The FELA cases involving railroad LIA violations require a showing that the locomotive was "in use" because, as already explained, railroads have a duty of care under the LIA only when their locomotives are actively in use. But as also already explained, enforcement of a duty of care on-line by railroads is

not the LIA's only regulatory tool for ensuring locomotive safety. The statute also delegates to DOT the authority to directly regulate the physical design and construction of locomotives themselves. A railroad accordingly may not violate the LIA's duty of care when a non-compliant locomotive is being repaired off-line, but DOT certainly possesses regulatory authority over that locomotive's design and manufacture even when it is being repaired. DOT may literally enter the roundhouse to inspect the repairs and prevent the locomotive from being used online until DOT is satisfied. *See, e.g.*, 49 C.F.R., parts 229 & 230. In short, the railroad's own duty of care under the LIA may be triggered only by *use* of the locomotive, but DOT's regulatory authority over locomotive equipment applies before, during, and after a locomotive is actively being used. And that broad authority—not the railroad's narrower duty of care—is what determines the scope of LIA preemption under *Napier*.[10]

Petitioners' claims challenge the use of asbestos in the design and manufacture of locomotive equipment. DOT plainly has authority to regulate the use of asbestos in the design of locomotive equipment.

---

[10] Both petitioners and the government rely on an early ICC document stating that "it is the 'use' of a locomotive not found to be in proper condition and safe to operate, and not the condition itself, which is a violation of the law." Inspection of Locomotive Boilers: Report of the Commission to the Senate, 73 I.C.C. 761, 763 (Aug. 29, 1922); Pet. Br. 23; U.S. Br. 15. The ICC's statement is irrelevant for reasons already explained—it describes when a railroad violates its duty of care under the Act, not the scope of the ICC's own authority to regulate locomotive equipment.

Indeed, in the 1990s, DOT—acting pursuant to a congressional mandate—expressly considered exercising its rulemaking authority to regulate asbestos use by locomotive manufacturers, and it declined to do so. *See supra* at 16. Because the "scope of field preemption is determined by the scope of the regulated field" (Pet. Br. 16), petitioners' claims are preempted.

C. Petitioners' Remaining Arguments Are Without Merit

1. *Amendments To The LIA's Civil Penalty Provision Did Not Alter The Act's Preemptive Scope*

Petitioners contend that their claims are not field preempted because the LIA's civil-penalty provision—which allows the United States to bring actions for civil penalties for violations of the Act—did not apply to manufacturers of locomotive equipment at the time Corson was allegedly exposed to asbestos. Pet. Br. 28-31. The government persuasively explains the flaws in that argument. U.S. Br. 27-28.

As originally enacted, the LIA provided that "any common carrier violating this Act or any rule or regulation made under its provisions ... shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court ... having jurisdiction." LIA § 9. That penalty provision was amended in 1988 to say that "an act by an individual that causes a railroad to be in violation of any of the provisions" of the Act "shall be deemed in violation." Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 14(7)(B), 102

Stat. 634. And it was amended again in 1992, explicitly to include manufacturers within the penalty provision. Rail Safety Enforcement and Review Act, Pub. L. No. 102-365, § 9(a)(8), 106 Stat. 978.

All of this is irrelevant to the question presented here, because—again—the scope of preemption under the LIA depends not on the identity of the *party* directly regulated, but on the *object* being regulated. *See Napier*, 272 U.S. at 612. As Judge Kozinski explained:

> The [L]IA preempts any state action that would affect "the design, the construction, and the material" of locomotives. *Napier*, 272 U.S. at 611. Imposing tort liability on railroad equipment manufacturers would do just that, by forcing them to conform to design and construction standards imposed by the states. This would transfer the regulatory locus from the Secretary of Transportation to the state courts—a result the [L]IA was clearly intended to foreclose.

Law, 114 F.3d at 911-12; *see also Oglesby*, 180 F.3d at 462; *Springston*, 130 F.3d at 244.

This Court rejected a similar argument in *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004). The party resisting preemption argued that the state regulations at issue were not preempted because they were directed at purchasers of cars, while the Clean Air Act was directed at manufacturers of cars. The Court explained that "treating sales restrictions and purchase restrictions differently for pre-emption purposes would make no sense. The manufacturer's right to sell federally ap-

proved vehicles is meaningless in the absence of a purchaser's right to buy them." *Id.* at 255.

So it is here. "Just as a car manufacturer's right to sell a car that meets certain specifications would be meaningless if no one were permitted to purchase such a car, a railroad's ability to operate a locomotive that meets certain specifications would be meaningless if no one were permitted to manufacture the parts of such a locomotive." U.S. Br. 29. In fact, on petitioners' view, Georgia and Wisconsin could have evaded this Court's holding in *Napier* and the ICC's authority by requiring that every locomotive sold be equipped with an automatic door for the firebox or a cab curtain, 272 U.S. at 607, rather than requiring railroads to use such equipment. Congress could not have intended that absurd result.

2. *The LIA Preempts State Common-Law Claims Falling Within The Scope Of DOT's Regulatory Power*

Petitioners (but not the government) contend that the LIA preempts only positive state law, and thus does not preempt petitioners' common-law claims. Pet. Br. 38-39. That argument is unavailing. As this Court repeatedly has explained, state "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959); *see, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868-69, 872 (2000); *Norfolk S. Ry. Co. v.*

Shanklin, 529 U.S. 344, 358 (2000); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-23 (1992). Petitioners here seek to sanction Viad and RFPC for the design—and material used in the design—of locomotives and locomotive equipment that they manufactured or distributed. That sanction would have precisely the same effect as any legislative or regulatory enactment imposing a similar penalty.

Petitioners rely (Pet. Br. 39) on the observation in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), that the desire to "foster[] uniformity," while "undoubtedly important to the industry," is "not unyielding." *Id.* at 70. But that was true in *Sprietsma* because uniformity was only one of the goals of the statutory scheme at issue, and not the "prominent" one. *Id.* Here, by contrast, uniformity *is* a "prominent" congressional regulatory objective of the LIA, as *Napier* and lower courts have consistently recognized, *see supra* at 28-29, and as the government here acknowledges, U.S. Br. 23-24. Varying state tort standards would undermine regulatory uniformity just as much as positive state regulation—if not more, given the added variability of jury trial outcomes. It is not surprising, then, that no federal court of appeals or state court of last resort has ever held that tort claims are exempt from LIA preemption. *See supra* at 8-9.

3. ***The FRSA Has Not Diminished The Scope Of DOT's Authority To Regulate Locomotive Equipment And Thus Has Not Altered The LIA's Preemptive Scope***

a. Petitioners (but not the government) contend that the LIA has lost its field-preemptive scope be-

cause "[s]tatutory changes in the past half-century have transformed the LIA into a relatively minor aspect of the broader regulatory regime created by the FRSA." Pet. Br. 32-33.

Petitioners misunderstand the nature of those regulatory changes. Before 1970, federal regulation of railroad safety was not plenary, but was limited to "certain and special types of railroad safety hazards," like locomotive equipment (LIA) and rail car (SAA) safety. H.R. Rep. No. 91-1194, at 2, *reprinted in* 1970 U.S.C.C.A.N. at 4105. Congress enacted the FRSA to "promote safety in *every* area of railroad operations." 49 U.S.C. § 20101 (emphasis added). Accordingly, Congress delegated *additional* authority to the Secretary of Transportation, *viz.*, the authority to "prescribe regulations and issue orders for every area of railroad safety *supplementing* laws and regulations"—including the LIA—"in effect on October 16, 1970." 49 U.S.C. § 20103(a) (emphasis added).

As the statute makes clear, the FRSA was meant to "supplement" the LIA and other then-existing statutes, not to supplant or alter such statutes. Indeed, as then-Judge Kennedy explained, the FRSA did "not subsume, replace, or recodify any acts." *Marshall*, 720 F.2d at 1153. To the contrary, Congress believed that then-existing laws like the LIA "have served well" and should be "continue[d] ... without change." H.R. Rep. No. 91-1194, at 2, *reprinted in* 1970 U.S.C.C.A.N. at 4105. To be sure, the LIA is now one part of a larger scheme of federal railroad-safety regulation, which did not exist until the FRSA was enacted. But DOT's domain over the

relevant field under the LIA—locomotive-equipment design—is just as dominant as it ever was.

b. Petitioners' reliance (Pet. Br. 33) on the saving clause in the FRSA preemption provision, 49 U.S.C. § 20106(a)(2), is misplaced, as the government explains, for the same reason. U.S. Br. 21 n.9. The saving clause—which states that a "State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation ... prescribes a regulation or issues an order covering the subject matter of the State requirement"—allows states to continue to regulate in areas *where states have always regulated* until the federal government says otherwise. But because the FRSA was intended to supplement and not supersede the LIA, "[t]he logical inference from this structure is that Congress intended to leave unchanged the force and effect of existing federal regulatory statutes." *Marshall*, 720 F.2d at 1153. For these reasons, the FRSA's preemption provision has no effect on areas previously preempted by federal law, like regulation of locomotive equipment.[11]

---

[11] *Marshall*'s analysis is supported by the FRSA's legislative history. The preemption provision was meant to assure that "*[e]xisting* state rail safety statutes and regulations remain in force until and unless preempted by federal regulation." H.R. Rep. No. 91-1194, at 24, *reprinted in* 1970 U.S.C.C.A.N. at 4130 (*emphasis added*). But there were *no* "existing" state rules "in force" concerning the design and manufacture of locomotives and their parts in 1970, because this Court had held that entire field preempted in *Napier* and this Court's holding on the breadth of the federal regulatory scheme had been followed consistently.

Petitioners' contrary reading would violate the "cardinal rule" that "repeals by implication are disfavored." *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) (quotation omitted). And it would undermine the FRSA's express command that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." *Id.* § 20106(a)(1); *see also* H.R. Rep. No. 91-1194, at 12, *reprinted in* 1970 U.S.C.C.A.N. at 4116 ("[I]t is the policy of Congress that rail safety regulations be nationally uniform to the extent practicable."). Granting federal regulatory authority over areas of railroad safety previously outside the bounds of federal authority went a long way toward accomplishing that goal compared to what came before, even though some interstitial state regulation would remain. But allowing states to regulate a subject they had *not* regulated before—i.e., the design and manufacture of locomotive equipment—would undermine rather than further the purpose of federal uniformity.

4. *The Remedial Consequences Of Preempting Claims Like Petitioners' Have Existed For Almost 90 Years And Are Not Irrational*

Petitioners also maintain that if field preemption extends beyond regulation of locomotives "in use," the resulting remedial scheme would be unworkable. Those concerns are inaccurate, overstated, or both; none justifies altering the longstanding preemptive scope of the LIA.

a. Petitioners first argue that employees injured in repair stations would have no claim against

manufacturers of locomotive equipment under either FELA (which applies only to railroads, not manufacturers), or state tort law (because state-law claims would be preempted). That concern is seriously exaggerated. To begin, preemption only applies to claims challenging the design, construction, or materials of a "locomotive or tender and its parts and appurtenances." 49 U.S.C. § 20701(a). If a repair-shop injury is caused by failure of, or defect in, a component that is not "an integral or essential part of a completed locomotive" or is not "definitely prescribed by lawful order" of DOT, *Lunsford*, 297 U.S. at 402, then a claim arising from that injury is not preempted by the LIA. *Cf.* U.S. *Atwell* Br. 18.[12]

Moreover, railroad employees injured off-line would still have a FELA claim against their railroad-employer. While they could not demonstrate *negligence per se* by proving an LIA violation, they could still obtain a FELA remedy simply by demonstrating that negligence by the railroad "played *any part* in bringing about the injury." *CSX*, 131 S. Ct. at 2634 (emphasis added). Particularly given this relaxed proximate cause standard, FELA hardly poses a high bar to recovery for railroad employees injured on the job. There is no need to distort settled LIA preemption doctrine to provide railroad employees with additional claims against locomotive manufacturers.[13]

---

[12] It is undisputed that petitioners' claims against Viad and RFPC concern the locomotive and its parts and appurtenances.

[13] The government also notes that independent contractors would lack any remedy for off-line injuries, because FELA only applies to employees and not independent contractors. U.S. Br.

Even if some potential plaintiffs are ultimately left without a damages remedy, that consequence simply follows from field preemption, which by definition precludes state-law claims *whether or not a federal claim or remedy exists*. As the government itself concedes, "[d]epriving injured individuals of a remedy may be justified when allowing a remedy would prevent the LIA from achieving its purpose." U.S. *Atwell* Br. 15. As the government also observes (U.S. Br. 16), a principal purpose of the LIA is to preclude states from regulating any aspect of locomotive equipment design or manufacture, to avoid "the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them." *Swift*, 230 F. Supp. at 407-08. Allowing states to prescribe, through their tort regimes, their own standards for locomotive equipment design and manufacture would plainly undermine that purpose.

---

19. Yet when it comes to locomotive-equipment-related injuries, the government concedes, as it must, that independent contractors clearly have no state-law remedy for injuries occurring while the locomotive was "in use," because such claims are preempted. U.S. Br. 12-22. The only class of independent contractors even *potentially* at issue is those injured *in the repair shop* by defective locomotive equipment. And even as to that sharply-circumscribed class, the government itself contends that many claims related to defective locomotive equipment would be barred by *conflict* preemption. U.S. Br. 24-25. It makes no sense to reconfigure almost 90 years of LIA preemption doctrine simply to preserve a vanishingly small class of independent contractor claims, especially absent any evidence that preservation of those claims was among Congress's objectives in enacting the LIA.

b. Petitioners also contend that preempting claims arising from locomotive equipment defects causing off-line injuries (but not on-line injuries) is unworkable because railroads would be precluded from bringing actions against manufacturers for contribution. Pet. Br. 42-43; *see also* U.S. Br. 20 n.8. That consequence says nothing about Congress's intent to preempt such claims against manufacturers. After all, Congress itself chose to preclude FELA claims against manufacturers. And in any event, railroads and manufacturers could presumably allocate responsibility for defective-equipment-related injuries *ex ante* through contractual indemnification provisions. The LIA precludes states from prescribing their own locomotive equipment standards—it does not preclude private parties from deciding how they want to allocate responsibility for equipment-related injuries.

II. TO THE EXTENT PETITIONERS' CLAIMS ARE NOT FIELD PREEMPTED, THEY ARE CONFLICT PREEMPTED

The government asserts that while petitioners' claims are not field preempted, several nevertheless are preempted because they directly conflict with the LIA's objective of establishing national uniformity in locomotive-design regulation. U.S. Br. 22-23. The distinction is little more than semantic. The government is correct, of course, about the LIA's critical and fundamental uniformity objective. But that is precisely why *all* state attempts to regulate the design, construction, or materials of locomotive equipment fall within that Act's ambit, regardless whether the locomotive is on- or off-line. Whether the label attached to the preemption rule is "field" or

"conflict," the substantive outcome should be the same in every case. Accordingly, if the Court were to conclude that field preemption is not the best doctrinal label for the LIA's preemptive effect, the Court should still hold that petitioners' claims are conflict preempted. Allowing petitioners' claims to go forward would undermine national uniformity in locomotive-design standards, and would thus create "an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

A. Petitioners' Design-Defect Claims Are Conflict Preempted

1. As explained, one of the LIA's principal purposes (if not the principal purpose) was to establish a single uniform regulatory regime governing the design and manufacture of locomotive equipment. *E.g.*, *Napier*, 272 U.S. at 611; *Swift*, 230 F. Supp. at 407; U.S. Br. 23. Accordingly, the government agrees that any "state-law tort claim[] arising from injuries sustained while a locomotive is not in use" would be preempted if it "would have the effect of prescribing rules about whether a locomotive is fit for use," because it would "result[] in different rules in different states regarding locomotives' fitness for service." U.S. Br. 24. "Because such a result would undermine one of the important objectives of the LIA, those claims would conflict with the LIA and be preempted." *Id.*

Petitioners' design-defect claims are squarely preempted under the government's approach, because they seek to impose sanctions on Viad and RFPC for the design and manufacture of the locomo-

tive equipment they manufactured or distributed. U.S. Br. 24-25. If petitioners' claims and those like them were allowed to go forward, manufacturers and distributors would be subject to the potentially varying policies of numerous jurisdictions through which they travel—policies concerning not only the use of asbestos but also myriad other materials and designs used in the manufacture of locomotives and locomotive equipment. That regime would directly interfere with the LIA's purpose of establishing uniformity in the regulation of locomotive design and manufacture.

2. a. Petitioners nevertheless contend that their design-defect claims do not conflict with any congressional purpose or objective because there is no federal requirement concerning the use of asbestos on locomotives. Pet. Br. 47-48. That argument misses the point. Petitioners' claims interfere with the LIA's objectives even in the absence of a contrary federal standard because the relevant objective is *uniformity*, which would not be possible if states were allowed to fill in the blanks of the federal regulatory scheme.

b. Petitioners also seek to avoid conflict preemption on the ground that asbestos is a hazard mainly to repair workers, and the LIA does not address hazards posed by the repair process. Pet. Br. 48-49. But again, state-law design-defect claims conflict with the LIA because they seek to impose inherently varying state-law standards for locomotive design and manufacture, which will undermine the uniformity in locomotive design and manufacture the LIA is intended to implement.

c. Petitioners further maintain that this Court's precedents at least permit state-law claims based on violation of the LIA's substantive provisions (including its duty-of-care provision). Because the LIA itself would provide the substantive rule of decision, they suggest, such state-law claims would not conflict with the LIA. Pet. Br. 49-52.

To start, petitioners misstate the Court's precedents—not one recognizes a state-law claim based on an LIA violation. Every one of petitioners' cited cases was brought under the SAA, *see supra* at 9, which was not the basis for the preemption ruling here and which does not define or control the field of locomotive equipment occupied by the LIA. No precedent of this Court has allowed a state-law tort claim premised on the LIA as the rule of decision. And even if such claims were allowed, that would demonstrate, at most, that states were permitted to enforce existing federal standards, and *not* to establish new standards different from or in addition to the uniform federal rules. *See, e.g.*, *Riegel*, 552 U.S. at 330.

In all events, petitioners' theory would not even salvage their own claims, because they admit that the use of asbestos in locomotive equipment violates neither FRA regulations nor the LIA's generic duty-of-care standard. Pet. Br. 49.

B. Petitioners' Failure-To-Warn Claims Are Conflict Preempted

The government asserts that while petitioners' design-defect claims are conflict preempted, their failure-to-warn claims are not. U.S. Br. 26-27. That purported distinction does not withstand scrutiny.

Federal and state courts have consistently rejected it, holding that the LIA preempts failure-to-warn claims concerning asbestos in locomotive equipment. *See supra* note 9 (citing cases).

The government says failure-to-warn claims are not preempted by the LIA's locomotive equipment regulatory scheme because they do "not require manufacturers of locomotives or railroads to alter the design or construction of their locomotives." U.S. Br. 26. But even though failure-to-warn claims may not themselves literally mandate physical alteration of the locomotive's design or construction, they still impose liabilities under differing state-law standards for lawful locomotive design and manufacture. Accordingly, the government's proposed distinction between failure-to-warn claims and design-defect claims is, for purposes of LIA preemption, "a distinction without a difference." *Oglesby*, 180 F.3d at 461.

The government's argument also is inconsistent with DOT's own exercise of its regulatory authority under the LIA. Citing its LIA authority explicitly, DOT has promulgated specific warning requirements for locomotive equipment. *See, e.g.*, 49 C.F.R. §§ 229.85 (warning notices for high voltage equipment), 229.113 (warning notices for steam generators); *see also Law*, 114 F.3d at 911 (DOT's warning requirements are promulgated under LIA). DOT's reliance on the LIA for these warning requirements confirms the should-be-obvious point that authority to regulate design and manufacture encompasses authority to determine whether a given design requires a warning. And if DOT's authority to regulate locomotive design and manufacture is exclusive, the same must be true for its subordinate authority

to prescribe warnings for locomotive designs. Put differently, if states are precluded by the LIA from deciding that certain locomotive designs are unlawfully dangerous, they cannot have authority to decide that the same designs are unlawfully dangerous if implemented without state-prescribed warnings.

Any other result would defeat the LIA's core objective. Absent preemption of failure-to-warn claims, "states could promulgate otherwise preempted safety regulations in the guise of instructional labels and then create causes of action for injured workers if railroads failed to post them." *Oglesby*, 180 F.3d at 461. Such claims would undermine the "uniformity-of-regulation objective of the LIA." U.S. Br. 25. Because repairs to locomotives may need to take place at any time, locomotives would need to be equipped with warnings that are sufficient in every state through which they travel. But states may require different formulations of the same warning, and a warning that one state mandates might be viewed by another as unnecessarily cluttering a warning label and thus affirmatively reducing the effectiveness of its own required warnings. That result is the antithesis of national uniformity. *See, e.g.*, *Law*, 114 F.3d at 910-11.

Even if it were possible to comply simultaneously with each state's warning requirements, the state with the most stringent requirements would effectively be able to impose its law as a nationwide standard. Under such a regime, the states, rather than DOT, would set the standard for locomotive equipment requirements, including warning requirements. That is exactly what Congress sought to avoid by enacting the LIA.

The government responds by suggesting that manufacturers can comply with differing state standards either by placing warnings in repair shops, by labeling their product with several different warnings, or by adopting the most stringent warning required by any state. U.S. Br. 27. None of those solutions makes sense. Manufacturers do not control repair shops, and thus they cannot simply post the relevant state's warnings in each shop. "[O]nce [manufacturers] sell the train, it's out of their hands." *Law*, 114 F.3d at 912 n.3. Even if they notified the railroad that purchased their product of the warning that needed to be given workers in a particular state, railroads often use repair shops that they do not own or control. When a locomotive breaks down in Montana, there is simply no way for the manufacturer or the railroad in New York to ensure that the workers at the closest repair shop receive the warning mandated by Montana law about the specific products that might be on that locomotive.

Labeling the product itself is similarly problematic. While warnings can be placed on product packaging, workers who repair or remove parts from trains after their initial installation will never see the packaging in which that product arrived. And it simply is not possible to place warnings directly on many parts and appurtenances, including boiler insulation and brake shoes, because of their physical properties. Even where a product could be stamped with a warning, the problem of conflicting state warnings persists. California might require manufacturers to label asbestos-containing products with detailed information about working with asbestos,

while Florida could require that manufacturers place only a single, state-created warning on all products containing asbestos to avoid confusing language or voluminous warnings that obscure the most important information. Failure-to-warn claims thus squarely conflict with the LIA's essential uniformity-of-regulation objective.

C. This Court Should Hold Petitioners' Claims Conflict Preempted If It Rejects Field Preemption

If this Court holds that petitioners' claims fall outside the preemptive field identified in *Napier*, it should hold they are conflict preempted for the reasons discussed above. The question whether petitioners' claims are conflict preempted is fairly encompassed within the question presented. Pet. i ("Did Congress intend the federal railroad safety acts to preempt state law-based tort lawsuits?"); *see* Pet. Br. 45 n.34. This Court also "may consider ... alternative grounds for affirmance." *United States v. Tinklenberg*, 131 S. Ct. 2007, 2017 (2011).

There is good reason to decide the conflict preemption issue now. As explained, the basis for conflict preemption in this case is substantively identical to the basis for field preemption—the LIA's policy of national uniformity in locomotive-design regulation. The difference between the two is formal at most. There is thus no prudential basis for declining to reach and resolve the conflict preemption question.

Moreover, current law in nearly every jurisdiction in the United States—including every federal circuit that has considered the question—is that the field of

locomotive design is preempted under *Napier*. A reversal of the Third Circuit on that ground would only lead to more confusion and division in the lower courts. Therefore, if the Court holds that petitioners' claims are not field preempted, it should address conflict preemption and hold petitioners' claims preempted, to provide lower courts with clear guidance concerning the scope of preemption under the LIA.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

DANIEL MARKEWICH
ELLEN G. MARGOLIS
AMY KALLAL
MOUND COTTON WOLLAN
& GREENGRASS
One Battery Park Plaza
New York, New York 10004
(212) 804-4200

Attorneys for Viad Corp

JAMES C. MARTIN
JOHN L. VITSAS
COURTNEY C.T. HORRIGAN
DAVID J. BIRD
ROBERT H. OWEN
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, Pennsylvania 15222
(412) 288-3131

Attorneys for Railroad
Friction Products Corp.

WALTER DELLINGER
JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
ANTON METLITSKY
JOANNA NAIRN*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted in Massachusetts only*

Attorneys for Viad Corp

October 3, 2011

REPLY BRIEF

Supreme Court, U.S.
FILED
OCT 28 2011
OFFICE OF THE CLERK

No. 10-879

IN THE
Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, WIDOW IN HER OWN RIGHT,
Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

RICHARD P. MYERS
ROBERT E. PAUL
ALAN I. REICH
MARY GILBERTSON
PAUL, REICH & MYERS, P.C.
1608 Walnut Street
Suite 500
Philadelphia, PA 19103
(215) 735-9200

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
EMILY T.P. ROSEN
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

October 28, 2011

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT:

I. IMPLIED FIELD PREEMPTION DOES NOT BAR PETITIONERS' CLAIMS 3

A. The LIA Regulates Only Fitness For Service 3

1. Design-defect claims 3

2. Failure-to-warn claims 15

B. The LIA Did Not Apply To Respondents At The Relevant Time 17

II. CONFLICT PREEMPTION PROVIDES NO BASIS FOR AFFIRMING THE JUDGMENT 18

A. Conflict Preemption Is Not Properly Presented 18

B. Conflict Preemption Does Not Apply 19

1. Failure-to-warn claims 20

2. Design-defect claims 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Baltimore & Ohio R.R. Co. v. Groeger, 266 U.S. 521 (1925) 14, 21

Bates v. Dow AgroSciences LLC, 544 U.S. 431 (2005) 7, 15, 16, 22

Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) 3

Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004) 18

Engvall v. Soo Line R.R. Co., 632 N.W.2d 560 (Minn. 2001) 14

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) 12

Great N. Ry. Co. v. Donaldson, 246 U.S. 121 (1918) 21

Greiner v. Volkswagenwerk Aktiengesellschaft, 540 F.2d 85 (3d Cir. 1976) 16

Herold v. Burlington N., Inc., 761 F.2d 1241 (8th Cir. 1985) 14

Hollister v. Dayton Hudson Corp., 201 F.3d 731 (6th Cir. 2000) 16

Law v. General Motors Corp., 114 F.3d 908 (9th Cir. 1997) 6, 11

Lilly v. Grand Trunk W.R.R. Co., 317 U.S. 481 (1943) 11

Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc., 555 F.3d 806 (9th Cir. 2009) 12

Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605 (1926) 1, 2, 3, 5, 6, 7, 8, 9, 10, 11

PLIVA, Inc. v. Mensing, 131 S. Ct. 2567 (2011) 19

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 10

Scott v. Chicago, R.I. & P.R.R. Co., 197 F.2d 259 (8th Cir. 1952) 14

Southern Ry. Co. v. Lunsford, 297 U.S. 398 (1936) 9

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 12

Swift & Co. v. Wickham, 230 F. Supp. 398 (S.D.N.Y. 1964), *aff'd*, 364 F.2d 241 (2d Cir. 1966) 11

Terminal R.R. Ass'n of St. Louis v. Brotherhood of R.R. Trainmen, 318 U.S. 1 (1943) 12, 13

Tipton v. Atchison, T. & S.F. Ry. Co., 298 U.S. 141 (1936) 14

Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co., 549 U.S. 443 (2007) 19

United States v. Baltimore & O.R.R. Co., 293 U.S. 454 (1935) 4

United States v. Locke, 529 U.S. 89 (2000) 10

United States v. Northern Pac. Ry. Co., 254 U.S. 251 (1920) 6

United States v. Tinklenberg, 131 S. Ct. 2007 (2011) 19

Urie v. Thompson, 337 U.S. 163 (1949) 11

Walton v. Southern Pac. Co., 48 P.2d 108 (Cal. Dist. Ct. App. 1935) 14

Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131 (2011) 12

Wyeth v. Levine, 129 S. Ct. 1187 (2009) 16, 17, 19, 20, 21

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const. art. I, § 8, cl. 3 (Commerce Clause) 12

Act of Feb. 17, 1911, ch. 103, 36 Stat. 913 (Boiler Inspection Act):

Preamble, 36 Stat. 913 11

Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* 9, 14

Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971 ..... 2, 5, 13, 15

§ 101, 84 Stat. 971 13

49 U.S.C. § 20101 *et seq.*:

49 U.S.C. § 20101 13

49 U.S.C. § 20106(a)-(b) 13

49 U.S.C. § 20106(b) 22

Locomotive Inspection Act, 49 U.S.C. § 20701 *et seq.* .....*passim*

49 U.S.C. § 20701 1

49 U.S.C. § 20701(1) 4, 8, 22

49 U.S.C. § 20702(a)-(b) 4

49 U.S.C. § 20702(a)(3) 4

49 U.S.C. § 20702(b)(3) 4

Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, Div. A, § 101, 122 Stat. 4848, 4851 13

49 U.S.C. § 103(c) 13

49 U.S.C. § 103(g)(1) 5

Safety Appliance Act, 49 U.S.C. § 20301 *et seq.* 6, 14

42 U.S.C. § 7543(a) 18

49 C.F.R. § 1.49(m) 15

49 C.F.R. Pt. 229, p. 441 (2010) 15

ADMINISTRATIVE MATERIALS

Policy Statement, Railroad Occupational Safety and Health Standards, 43 Fed. Reg. 10,583 (Mar. 14, 1978) 5

OTHER MATERIALS

Baldwin-Lima-Hamilton Corp., *Engine Manual for 600 Series Diesel Engines* (1951), *available at* http://www.rr-fallenflags.org/manual/blh-6em.html 17

Br. for the United States as Amicus Curiae, *John Crane Inc. v. Atwell*, No. 10-272 (U.S. filed May 6, 2011) 9

http://spec.lib.vt.edu/imagebase/norfolksouthern/full/ns770.jpeg 17

All agree that field preemption cannot extend beyond the scope of the regulated field. *See* Pet. Br. 20; Resp. Br. 30; U.S. Br. 13. Petitioners' claims are not within the field regulated by the Locomotive Inspection Act ("LIA"), and therefore are not preempted, for two separate reasons. First, the Act imposes requirements for locomotives in "use" on a "railroad line," 49 U.S.C. § 20701, whereas petitioners' claims seek recovery for injuries incurred in repairing and maintaining locomotives not in use on a line, *see* Pet. Br. 21-28; U.S. Br. 13-22. Second, respondents were not even subject to regulation under the Act at the relevant time period; indeed, Congress considered but did not pass a bill that would have applied to manufacturers. *See* Pet. Br. 28-31.

Notably, respondents have virtually nothing to say about petitioners' failure-to-warn claims. That is not surprising, considering Congress has not authorized the Federal Railroad Administration ("FRA") or its predecessor to issue regulations under the LIA concerning warnings about hazards to mechanics who repair and maintain locomotives.

Respondents offer essentially three arguments to support their sweeping assertion of implied field preemption. First, that the holding in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926), that states may not require particular safety equipment to be installed on locomotives for use on the line extends to state-law claims brought by mechanics injured while repairing locomotives not in use. Second, that uniformity interests override safety concerns under the LIA. And, third, that because a locomotive's design is the same whether it is on the line or in the shop, a state cannot provide remedies

for injuries caused by latent defects that harm only repair workers.

Those contentions have no merit. *Napier* concerned only regulatory requirements that locomotives must meet to be "fit[] for service" on the line, 272 U.S. at 612; it did not address state tort claims for latent hazards to workers injured repairing and maintaining locomotives that are out of service. To the extent *Napier* addressed uniformity, it rejected respondents' contention that the LIA demands uniform national standards for locomotive safety.

Respondents' attempt to rely on an asserted congressional goal of regulatory uniformity to expand the field regulated by the LIA lacks support in the Act's text. It also defies common sense: every other major means of interstate transportation – including cars, trucks, boats, and airplanes – is subject to state-law design-defect claims. Indeed, because the LIA applies only to locomotives, the rest of the train is indisputably subject to state-law claims under the savings clause of the Federal Railroad Safety Act of 1970 ("FRSA"). Respondents offer no reason why the locomotive must be treated differently from the caboose.

Finally, a locomotive designed for safe use on the line may expose mechanics to unreasonable risks during maintenance and repairs. Respondents' theory immunizes manufacturers of defective products in such circumstances: injured workers cannot bring claims based on violations of the LIA because the locomotive was not "in use," and preemption bars state-law claims. Respondents fail to square that result with Congress's prime purpose of promoting worker safety.

I. IMPLIED FIELD PREEMPTION DOES NOT BAR PETITIONERS' CLAIMS

A. The LIA Regulates Only Fitness For Service

Respondents concede (at 33 n.6, 37) both that "the LIA's regulatory concern (and hence [the FRA's] authority) is directed toward *operational locomotives*" and that "the LIA does not delegate [to the FRA] authority to generally regulate the repair and maintenance of locomotives." They assert (at 23-24), however, that petitioners' claims nevertheless fall within the field regulated by the LIA because that field supposedly extends to "all aspects of" the design, construction, and material of locomotives and locomotive parts. That theory lacks merit.

1. Design-defect claims

The FRA has authority under the LIA to regulate the design, construction, and material of locomotives to ensure "fitness for service," *Napier*, 272 U.S. at 612, but not to protect the safety of workers repairing and maintaining out-of-service locomotives. Respondents' contrary view disregards the statutory text, misunderstands this Court's precedent, and relies on unsupported notions of congressional purpose.

Statutory Text. Respondents identify no statutory language in the LIA that expressly preempts state law. *Cf. Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 616-17 (1997) (Thomas, J., dissenting) ("[F]ield pre-emption is itself suspect, at least as applied in the absence of a congressional command that a particular field be pre-empted."). Their expansive theory of the Act's regulated field likewise lacks textual support. The LIA requires a railroad to ensure that a locomotive is "in proper condition and safe to operate" before it may "use"

that locomotive "on its railroad line." 49 U.S.C. § 20701(1). That is the LIA's sole substantive standard; the remainder of the Act contains procedures for enforcing that standard. *See* Pet. Br. 21-23. Uniform precedents addressing claims by rail workers alleging LIA violations confirm that the Act's regulatory scope concerns only requirements for the safe use of locomotives; the LIA cannot be violated when a locomotive is not in use. *See* Pet. Br. 23-27; U.S. Br. 15 & n.5.

Respondents argue (at 32-33, 40-41) that the provisions granting the FRA authority to *inspect* locomotives, *see* 49 U.S.C. § 20702(a)-(b), broaden the field regulated by the Act. But the LIA's inspection provisions cannot be divorced from the substantive safety standard they are intended to implement. *See id.* § 20702(a)(3) (railroad must "repair[] every defect that is disclosed by an inspection before a defective locomotive, tender, part, or appurtenance is *used*"), (b)(3) (noncompliant locomotive equipment "may be *used*" only after it has been repaired and re-inspected) (emphases added). That does not mean that the FRA's authority under the LIA "cease[s] to exist merely because the locomotive enters a roundhouse for repairs." Resp. Br. 31. Regardless of the location at which an inspection occurs, the statutory purpose of it is to determine whether the locomotive is safe for use on the line. Nothing in the Act authorizes or requires inspectors to address risks that locomotive equipment poses for mechanics in repair shops.

Nor does the Act permit the FRA to require locomotive equipment to be designed in a certain way to reduce risks to repair and maintenance workers. *Cf. United States v. Baltimore & O.R.R. Co.*, 293 U.S. 454, 463-64 (1935) (invalidating Interstate Commerce

Commission ("ICC") order under LIA for failure to make required finding that "the *use* of locomotives" lacking the safety device at issue "causes unnecessary peril to life or limb") (internal quotations omitted; emphasis added). Likewise, for example, the LIA would not authorize the FRA to require that locomotives be built using only steel produced in the United States.

The FRA, which currently has authority to administer the LIA, *see* 49 U.S.C. § 103(g)(1), confirms that "[t]he LIA regulates only *the safe use on railroad lines* of locomotives or tenders and their parts and appurtenances." U.S. Br. 13 (emphasis added). The agency's authority under the Act is not "broader" than determining "whether the locomotive, tender, and parts and appurtenances, as designed and constructed, are safe to use or operate on a railroad line." *Id.* at 17.[1] Accordingly, "tort claims based on injuries arising while locomotives are not in use" are beyond the field regulated by the Act and therefore are not subject to field preemption. *Id.* at 13, 17.

Napier. *Napier* held that state legislation requiring railroads to install particular safety devices on their locomotives before "us[ing]" them on railroad lines was preempted because it fell "within the scope of the authority delegated to" the ICC "to prescribe the rules and regulations *by which fitness for service shall be determined.*" 272 U.S. at 607, 611-12 (emphasis added). *Napier*'s preemption ruling thus

---

[1] Respondents' attempt to bolster their mistaken understanding of the LIA's regulatory scope through citations (at 38-39 & n.8) to the FRA's 1978 policy statement fails because that document concerned the agency's exercise of its authority under the FRSA. *See* Policy Statement, Railroad Occupational Safety and Health Standards, 43 Fed. Reg. 10,583, 10,584 (Mar. 14, 1978).

rested on the view that the state statutes at issue there interfered with the ICC's authority to determine what equipment is necessary to ensure that a locomotive is "fit[] for service" and "'in proper condition' for operation" on rail lines. *Id.* at 612. Petitioners' state-law claims have nothing to do with the fitness of locomotives for use. They accordingly differ fundamentally from the state laws held preempted in *Napier*.[2]

Lacking support in *Napier*'s holding, respondents advocate for multiple sweeping extensions of *Napier*. They argue that *Napier* should be applied to preempt not only state requirements for locomotives used on railroad lines (such as the Georgia and Wisconsin statutes) but also common-law duties to avoid unnecessary hazards to repair and maintenance workers. According to respondents, because a locomotive's basic design is "the same whether the locomotive is in use or not," any state-law claim that relates in any way to the locomotive's design is preempted. Resp. Br. 33.

At the outset, respondents' argument overlooks that some locomotives never qualify as "in use" under the LIA because they operate only in switch yards. *Cf. United States v. Northern Pac. Ry. Co.*, 254 U.S. 251, 254-55 (1920) (Safety Appliance Act ("SAA")

---

[2] Because *Napier* dealt with state legislation imposing fitness requirements, not common-law duties to avoid unreasonable dangers to mechanics, manufacturers could not have relied "for more than eight decades," as respondents assert (at 29), on a supposed immunity from state-law claims like petitioners'. Indeed, the earliest case respondents cite holding that the LIA preempts state-law claims against a manufacturer (*Law v. General Motors Corp.*, 114 F.3d 908 (9th Cir. 1997)) was decided more than seven decades after *Napier*, and it involved injuries caused by locomotives in use on the line.

does not apply to locomotives used for "switching, classifying and assembling cars within railroad yards for the purpose of making up trains"). Respondents cite no evidence supporting their assertion (at 33 n.6) that Mr. Corson repaired only locomotives used on the line.

More fundamentally, respondents' argument contradicts the principle – which they concede (at 30) applies here – that field preemption does not reach beyond the regulated field. A state-law claim alleging that locomotive equipment was unreasonably dangerous for repair workers does not concern whether the equipment was "fit[] for service" or "'in proper condition' for operation." 272 U.S. at 612. Such a claim therefore lies outside the field regulated by the LIA, even if a jury verdict on that claim might motivate a manufacturer to avoid future injuries to such workers by altering the equipment's design.[3]

Respondents take out of context *Napier*'s statement that "the power delegated to the [ICC] by the [LIA] . . . extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 611. The Court's point was that the ICC had authority to impose requirements with respect to design, construction, and material as necessary to regulate "fitness for service." *Id.* at 612. Nothing in *Napier* suggested that the ICC could promulgate a regulation requiring

---

[3] *Cf. Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 443 (2005) ("An occurrence that merely motivates an optional decision does not qualify as a requirement. The Court of Appeals was therefore quite wrong when it assumed that any event, such as a jury verdict, that might 'induce' a pesticide manufacturer to change its label should be viewed as a requirement.").

locomotives or locomotive parts to be designed in a particular way to reduce risks to repair workers.

The distinction between fitness requirements and common-law duties to avoid unreasonable hazards to repair and maintenance workers is not merely theoretical. For example, an air horn on a locomotive may function precisely as intended when it sounds at high volume as the locomotive travels on the line, but without a properly functioning means to prevent it from sounding unintentionally while the locomotive is undergoing repairs, the horn may be unreasonably hazardous to shop workers. Likewise, asbestos insulating a locomotive boiler or contained in a brake shoe might pose little threat to the safe use of the locomotive, even while causing fatal diseases in mechanics charged with maintaining and replacing such parts. *See* Pet. Br. 48-49. Because petitioners' claims concern only whether the locomotive equipment respondents manufactured was unreasonably dangerous when being disassembled for repairs, they do not "amount to a claim that the use of asbestos-containing products on locomotives would as a matter of law render such locomotives not 'safe *to operate* without unnecessary danger of personal injury.'" U.S. Br. 25 (quoting 49 U.S.C. § 20701(1)) (emphasis added).[4]

---

[4] Respondents incorrectly assert (at 35-36) that recognizing differences between fitness requirements and state-law duties to avoid unreasonable risks to repair workers conflicts with *Napier*. Under *Napier*, a state law requiring the installation of equipment on a locomotive is preempted whether its purpose is to prevent "accidental injury" to crew members on the line or "sickness and disease" to those same workers. 272 U.S. at 612. But, here, the state-law duty differs not only in purpose, but in kind: it addresses unreasonable risks of harm faced by mechanics charged with dismantling and reassembling locomotive parts, not hazards to the safety of workers on operational locomotives.

Respondents also assert (at 44-45) that *Napier* should be extended to preempt not only state legislation but also common-law claims, even where injured persons would be left without a remedy. They cite cases in which this Court has recognized the incidental regulatory effect of state common law, but fail to address the Court's holdings that common-law claims – which have a compensatory function as well – differ from state positive law for purposes of field preemption. *See* Pet. Br. 38-39. Nor do respondents explain why Congress would have intended, in enacting legislation like the LIA and the Federal Employers' Liability Act ("FELA") to *improve* worker safety, the anomalous remedial gaps their position creates. *See id.* at 42-43.[5]

Respondents urge the Court to extend *Napier* even though its reasoning reflects an approach to preemption analysis long ago abandoned by this Court. *See* Pet. Br. 40-41; Scholars Br. 6-12. Respondents dispute that fact, relying on *Napier*'s statement that "[t]he intention of Congress to exclude states from exerting their police power must be clearly manifested." 272 U.S. at 611. But the inconsistency between *Napier*'s approach and this Court's post-

---

[5] Seeking to minimize those gaps, respondents represent that claims based on injuries caused by "component[s]" of locomotives that are not deemed "'an integral or essential part of a completed locomotive'" are not preempted. Resp. Br. 49 (quoting *Southern Ry. Co. v. Lunsford*, 297 U.S. 398, 402 (1936), and citing U.S. Br. at 18, *John Crane Inc. v. Atwell*, No. 10-272 (U.S. filed May 6, 2011)). But that concession only undercuts the uniformity rationale on which they rely so heavily: if claims involving some locomotive "components" are exempt from preemption, then preemption is unnecessary to avoid potentially differing liability standards as the locomotive crosses state lines. *See also infra* pp. 10-15.

New Deal preemption jurisprudence is not so easily dismissed: whereas *Napier* found field preemption based on the mere *existence* of federal regulatory authority, subsequent cases have demanded explicit statutory language, comprehensive statutory or regulatory provisions, or a special federal interest in the regulated subject matter, none of which was present in *Napier*. *See, e.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 233 (1947) (basing preemption on statutory language providing that "'the power, jurisdiction, and authority' of the Secretary [of Agriculture] conferred under the Act 'shall be exclusive with respect to all persons' licensed under the Act"); *United States v. Locke*, 529 U.S. 89, 99-100 (2000) (basing field preemption on mandatory federal regulations in areas of longstanding, exclusive national concern); Pet. Br. 19 & n.17. Respondents offer no good reason to extend *Napier* to bar state-law claims in the very different circumstances presented here.

Uniformity. Citing lower-court cases decided decades after the LIA's enactment, respondents posit (at 36) that petitioners' claims must be within the preempted field because allowing them to proceed supposedly would impair "national uniformity in locomotive safety standards." But vague notions of congressional purpose cannot be relied on to extend the LIA's regulated field to cover petitioners' claims.

Respondents cite not one word of statutory text – or even legislative history – indicating that Congress viewed uniformity as its paramount objective in enacting the LIA. They assert (at 28-29, 45) that *Napier* recognized a uniformity goal, but that case mentioned the concept of uniformity only to *reject* it. The Court explained that, if the ICC were to promulgate regulations on fire doors or cab curtains, the

rules "*need not be uniform* throughout the United States, or at all seasons, or for all classes of service." 272 U.S. at 613 (emphasis added). The Act itself, and this Court's cases construing it, further undermine respondents' position, for they recognize a congressional purpose of promoting safety, not uniformity. *See* Preamble, 36 Stat. 913 (Act passed "[t]o promote the safety of employees and travelers upon railroads"); *Urie v. Thompson*, 337 U.S. 163, 191 (1949) ("the prime purpose of the Boiler Inspection Act was the protection of railroad employees and perhaps also of passengers and the public at large"); *Lilly v. Grand Trunk W.R.R. Co.*, 317 U.S. 481, 486 (1943).[6]

Moreover, the policy rationale underlying respondents' appeals to uniformity – namely, that design-defect claims must be barred, lest manufacturers be forced "to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state," Resp. Br. 29 (internal quotations omitted) – is manifestly unpersuasive. Every other major means of interstate transportation – including automobiles, trucks, boats, and planes – is subject to state-law

---

[6] The lower-court authority on which respondents rely (at 28-29) does not fill the void in their argument. *Swift & Co. v. Wickham*, 230 F. Supp. 398 (S.D.N.Y. 1964) (three-judge court), *aff'd*, 364 F.2d 241 (2d Cir. 1966), involved whether a federal statute regulating the labeling of poultry products impliedly preempted a New York law on the same subject. In *dicta*, the court speculated that *Napier* "must have been influenced" by concerns about state prescriptive rules. *Id.* at 407-08. But it cited no statutory support for that supposition; nor did it acknowledge *Napier*'s conclusion that safety devices "need not be uniform throughout the United States." 272 U.S. at 613. *Law* is unpersuasive for the same reasons.

design-defect claims in certain circumstances, and neither respondents nor their *amici* offer any cogent reason why locomotives must be treated differently. For example, in *Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131 (2011), the Court held that federal regulation of automobile design did not "pre-empt[] a state tort suit that, if successful, would . . . impos[e] tort liability upon those who choose to install a simple lap belt" for rear inner seats. *Id.* at 1134; *see Freightliner Corp. v. Myrick*, 514 U.S. 280, 289-90 (1995) (trucks). In *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), the Court held that federal regulation did not preempt a design-defect claim against the manufacturer of a boat motor for failure to install a propeller guard. *See id.* at 55, 64-70. Lower courts likewise have held that certain design-defect claims against airplane manufacturers are not preempted by federal regulation. *See, e.g., Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009). None of those cases accepted respondents' premise that design-defect liability is incompatible with movement in interstate commerce.[7] In fact, *Sprietsma* expressly rejected respondents' policy argument, holding that, absent a conflicting determination by a federal regulator, "the concern with uniformity does not justify the displacement of state common-law remedies." 537 U.S. at 70.

---

[7] Those examples also reveal that respondents' field-preemption theory is functionally a disguised – and unfounded – dormant Commerce Clause argument. *See* Scholars Br. 16-17, 32; *Terminal R.R. Ass'n of St. Louis v. Brotherhood of R.R. Trainmen*, 318 U.S. 1, 7-9 (1943) (rejecting dormant Commerce Clause challenge to state regulation requiring cabooses).

Indeed, respondents' uniformity argument does not extend even to the entire train. The LIA applies only to locomotives, tenders, and their parts. Thus, for example, in *Brotherhood of Railroad Trainmen*, this Court held that the LIA did not preempt an Illinois regulation requiring cabooses to be used on trains. *See* 318 U.S. at 4. It also explained that, "[i]f lack of facilities at the state line requires as a practical matter that in order to provide cabooses in Illinois appellant must also provide them for some distance in Missouri, that fact does not preclude Illinois from regulating the operation to the limits of its territory." *Id.* at 8-9.

Today, the portions of the train other than the locomotive are indisputably governed by the FRSA. That statute provides both that railroad-safety laws "shall be nationally uniform to the extent practicable" and that state law is not preempted unless the Secretary of Transportation "prescribes a regulation or issues an order covering the subject matter of the State requirement" (and even then actions seeking damages for personal injuries may proceed based on violations of federal standards). 49 U.S.C. § 20106(a)-(b).[8] By providing in the same statutory section that laws should be nationally uniform, but that state law is not preempted unless there is a federal regulation on point, Congress necessarily determined that, where (as here) there is no applicable

---

[8] *See also* FRSA § 101, 84 Stat. 971 (codified as amended at 49 U.S.C. § 20101) (FRSA's "purpose" is "to promote safety"); Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, Div. A, § 101, 122 Stat. 4848, 4851 (codified at 49 U.S.C. § 103(c)) (providing that FRA "shall consider . . . safety as the highest priority").

federal rule, state-law claims do not impermissibly conflict with the national interest in uniformity.

Finally, respondents' assertion (at 22) that "allowing individual juries to regulate locomotive design or manufacture through liability awards would undermine the LIA's national-uniformity objective" ignores the long history of juries deciding whether a given locomotive's design complies with the LIA's general safety standard. For a century, juries have made those determinations in FELA cases, *see* Pet. Br. 24 n.21; Resp. Br. 40, as well as in cases involving state-created causes of action based on LIA violations.[9] For example, in *Baltimore & Ohio Railroad Co. v. Groeger*, 266 U.S. 521 (1925), a FELA case based on an alleged LIA violation, the Court held that, absent an applicable federal regulation, the jury should be instructed to decide whether the defendant complied with its duty "to put and keep the locomotive in proper condition and safe to operate." *Id.* at 527.

---

[9] Respondents incorrectly deny (at 9, 54) the latter cases exist. They admit (at 9) that several of this Court's cases have allowed state-created actions based on SAA violations. And, in *Tipton v. Atchison, Topeka & Sante Fe Railway Co.*, 298 U.S. 141 (1936), this Court squarely recognized that a California appellate court was "[c]orrect[]" in "holding" that "the same principles apply in an action under the Boiler Inspection Act as in one under the [SAA]." *Id.* at 151 (citing *Walton v. Southern Pac. Co.*, 48 P.2d 108, 115 (Cal. Dist. Ct. App. 1935)); *see Engvall v. Soo Line R.R. Co.*, 632 N.W.2d 560, 569 (Minn. 2001) (rejecting manufacturer's argument that "a violation of the LIA . . . cannot be used as the basis for a private negligence action brought under the common law"); *Herold v. Burlington N., Inc.*, 761 F.2d 1241, 1245-47 (8th Cir. 1985); *Scott v. Chicago, R.I. & P.R.R. Co.*, 197 F.2d 259, 261 (8th Cir. 1952); *see also* AAR Br. 26 ("[S]ince manufacturers have an obligation to comply with the LIA . . . , they too may be liable for breaching that obligation through a common law action utilizing federal substantive law as the standard of liability.").

Therefore, "lay juries are in no sense anathema to [the LIA]'s scheme." *Bates*, 544 U.S. at 452.

2. Failure-to-warn claims

Respondents' entire field-preemption argument focuses on the "design" of locomotives and essentially ignores petitioners' failure-to-warn claims. *See* Resp. Br. 25-51. Respondents briefly assert (at 39 n.9) that those claims "fall within the LIA's field preemptive scope" because they supposedly "challenge the design or manufacture of locomotive equipment." But respondents later admit (at 55) that "failure-to-warn claims may not themselves literally mandate physical alteration of the locomotive's design or construction." Despite that concession, respondents unpersuasively attempt (at 55-58) to bring failure-to-warn claims within their (exceedingly broad) view of the LIA's regulatory scope.

First, the LIA contains no provision addressing warnings regarding dangers involved in repairing and maintaining locomotives.[10] A statute cannot preempt a "field" by omission. Respondents reason (at 55-56) that, if the FRA's "authority to regulate locomotive design and manufacture is exclusive, the same must be true for its subordinate authority to

---

[10] Respondents argue (at 55) that the FRA has promulgated warning requirements pursuant to the LIA. But neither warning regulation cited by respondents addresses hazards particular to the repair process; those regulations thus do not suggest that the LIA empowers the FRA to prescribe warnings regarding those dangers. Moreover, the FRA has explained that those regulations cannot be relied on to broaden the field regulated by the LIA because the agency relied at least in part on its authority under the FRSA in adopting them. *See* U.S. Br. 18 n.6 (citing 49 C.F.R. Pt. 229, p. 441 (2010)); *see also* 49 C.F.R. § 1.49(m) (delegating to FRA authority to carry out functions vested in Secretary of Transportation by FRSA).

prescribe warnings for locomotive designs." But that does not follow; any FRA authority over locomotive design does not confer exclusive agency authority over warnings. The same flaw pervades respondents' argument (at 56) that allowing failure-to-warn claims "would defeat the LIA's core objective" of uniformity. Respondents cite nothing in the Act supporting the notion that Congress required uniform warnings for repair-related hazards.

Second, respondents assert (at 55) that failure-to-warn claims "impose liabilities under differing state-law standards for lawful locomotive design and manufacture." The basis of liability for failure to warn, however, is not the "design" or "manufacture" of a product; it is the failure to provide adequate warnings regarding the product's risks. *See generally Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009). A product may be designed and manufactured in an entirely reasonable manner, but the manufacturer is nevertheless generally liable under state common law for injuries resulting from the failure to furnish proper warnings and instructions. *See, e.g., Greiner v. Volkswagenwerk Aktiengeselleschaft*, 540 F.2d 85, 92-93 (3d Cir. 1976) (failure to warn is "an independent basis of liability, not requiring the jury to find a design defect"); *Hollister v. Dayton Hudson Corp.*, 201 F.3d 731, 740 (6th Cir. 2000) ("For example, without a warning as to its weight restrictions, a highway bridge might be legally 'defective' even if it was designed safely and was in perfect working order."); *cf. Bates*, 544 U.S. at 444-46.

Third, respondents argue (at 57) that requiring a manufacturer to warn repair workers does not "make[] sense." Concerns about the feasibility of providing particular warnings pertain to the merits

of petitioners' claims, however, not whether they are preempted. In any event, locomotive and equipment manufacturers, such as respondents' corporate predecessors, have provided warnings through service manuals used by repair and maintenance workers.[11] Manufacturers also have placed warnings directly on locomotive parts.[12] And respondents offer no reason why packages for replacement parts containing asbestos could not have been labeled with warnings and instructions regarding the hazards and safe installation of those products. Although respondents raise (at 56-58) the specter of different states "requir[ing]" different warnings, they ignore the fact that a jury verdict on a failure-to-warn claim "establishe[s] only that" the warning (or lack thereof) "was insufficient" and does "not mandate a particular . . . warning." *Wyeth*, 129 S. Ct. at 1194; *see also* U.S. Br. 27 (warning "requirements are a cost of doing interstate business in many industries").

B. The LIA Did Not Apply To Respondents At The Relevant Time

Field preemption cannot apply here for the additional reason that the LIA did not regulate respondents until years after the events giving rise to this case. Respondents assert (at 42) that the government "explains the flaws" in petitioners' argument, but the government simply did not address it. *See* U.S. Br. 28 ("there is no need to address that ques-

---

[11] *See, e.g.*, Baldwin-Lima-Hamilton Corp., *Engine Manual for 600 Series Diesel Engines* 23, 101 (1951) (providing warnings and instructions for safe maintenance of locomotive engine), *available at* http://www.rr-fallenflags.org/manual/blh-6em.html.

[12] *See, e.g.*, http://spec.lib.vt.edu/imagebase/norfolksouthern/full/ns770.jpeg (picture of interior of steam locomotive with engraved warning on locomotive part).

tion here"). The government contends that *conflict* preemption can occur even where a defendant is not subject to regulation under the statute, *see id.*, which we acknowledge is possible (but not the case here, where no actual conflict exists). *See* Pet. Br. 31 n.26.

Respondents erroneously rely (at 43-44) on *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004). That case involved *express* preemption – not implied field preemption – through a statute providing that no state could adopt "'any standard relating to the control of emissions from new motor vehicles.'" *Id.* at 252 (quoting 42 U.S.C. § 7543(a)). This Court held that Congress intended the statute's express preemption of emissions standards to apply not only to restrictions on what vehicle manufacturers could build but also to restrictions on what vehicle purchasers could buy. *See id.* at 253-54. Here, by contrast, respondents argue that preemption should be implied *beyond* the extent of the regulated field. Because the regulated field did not reach respondents, there is no basis to imply preemption of petitioners' claims against them; nothing in *Engine Manufacturers* is to the contrary.

II. CONFLICT PREEMPTION PROVIDES NO BASIS FOR AFFIRMING THE JUDGMENT

A. Conflict Preemption Is Not Properly Presented

Respondents do not dispute that conflict preemption was neither raised nor decided below. *See* Pet. Br. 44; Resp. Br. 58. When an issue has not been raised or decided in the lower courts, this Court does not consider the issue to be properly before it – even if the question presented might be interpreted to encompass that issue, as respondents assert (at 58) is

the case here. *See* Pet. Br. 44-45; *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 455 (2007).[13] Here, moreover, the necessary "inquiry into whether the ordinary meanings of state and federal law conflict," *Wyeth*, 129 S. Ct. at 1208 (Thomas, J., concurring in the judgment) (internal quotations omitted), would be best performed, if at all, on remand, *see* Pet. Br. 45 & n.35; U.S. Br. 22.

B. Conflict Preemption Does Not Apply

State-law claims based on injuries resulting from exposure to asbestos in rail-repair facilities pose no actual conflict with the LIA. *See* Pet. Br. 46-52. Respondents do not deny that "it is []possible for a private party to comply with both state and federal requirements" here. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 (2011) (internal quotations omitted). They instead base their conflict-preemption argument on the theory that state-law claims "create an obstacle to the accomplishment of the full purposes and objectives of Congress." Resp. Br. 52 (internal quotations omitted).

Respondents remarkably concede (at 58) that their obstacle-preemption theory "is substantively identical to" their claim of implied field preemption and thus depends on the premise that petitioners' claims would impair congressionally mandated uniformity. Therefore, like their implied-field-preemption theory, respondents' obstacle-preemption argument collapses with respondents' failure to show that the LIA embodies a uniformity requirement that would exclude state-law claims involving hazards outside the LIA's

---

[13] In *United States v. Tinklenberg*, 131 S. Ct. 2007, 2017 (2011), the only case that respondents cite on this point, the alternative ground for affirmance was decided by the court of appeals.

regulated field. *See supra* Part I.A.1. No alternative basis exists for finding obstacle preemption here.

1. Failure-to-warn claims

Respondents do not dispute that nothing in the LIA or any regulation promulgated under it has *ever* required or prohibited any warning regarding asbestos in locomotive equipment, let alone a warning of the risks to repair workers. They assert (at 55), however, that the FRA has authority under the LIA to prescribe warnings for locomotive equipment. *But cf. supra* note 10. The bare *existence* of regulatory authority, however, does not establish conflict preemption. Conflict preemption occurs only when the agency has *exercised* that authority in a manner that actually conflicts with state law. Thus, in *Wyeth*, the Food and Drug Administration certainly had authority over warnings for prescription drugs, *see* 129 S. Ct. at 1196, but the plaintiff's failure-to-warn claim was not preempted because the agency had not exercised that authority to prohibit a stronger warning, *see id.* at 1203 n.14.

The same is true here. Absent any FRA regulation prohibiting warnings regarding the dangers asbestos in locomotive equipment poses to mechanics, there is no basis for conflict preemption.

2. Design-defect claims

Respondents do not dispute that no "contrary federal standard" conflicts with petitioners' design-defect claims. Resp. Br. 53. They therefore wrongly accuse petitioners of arguing that "a state can overrule" the FRA "and mandate a different design." *Id.* at 38. No federal agency has ever required locomotive-equipment manufacturers to insulate their products with asbestos, so this case raises no issue

of state law attempting to "overrule" any federal judgment.

In suggesting (at 25) that petitioners' design-defect claims could conflict with *Groeger*'s instruction that juries cannot "restrict the carriers in their choice of mechanical means by which their locomotives . . . are to be kept in proper condition," 266 U.S. at 530-31, the government misunderstands both *Groeger* and petitioners' claims. The problem in *Groeger* (which involved a worker killed while operating a locomotive on the line) was that the jury instruction specifically and impermissibly "authorized [the jury] to find that the [LIA] required defendant to have a fusible plug." *Id.* at 529. Here, the jury would not be asked to find that federal or state law required (or prohibited) any particular equipment, but rather that the equipment respondents voluntarily chose to use had latent defects that posed unreasonable risks of harm to mechanics who repaired and maintained it. *See* Pet. Br. 47 & n.36. A finding of liability on such a claim would not deprive railroads or manufacturers of "the choice of means to be employed" to make locomotive equipment reasonably safe for repair workers. *Groeger*, 266 U.S. at 530; *see also Great N. Ry. Co. v. Donaldson*, 246 U.S. 121, 128 (1918) (jury can find equipment unsafe under LIA even though agency has not "disapproved" its use); *cf. Wyeth*, 129 S. Ct. at 1194.

Further, even a state-law claim (unlike petitioners') based on an injury suffered by a crew member of a locomotive being operated on a rail line would not conflict with the LIA so long as it paralleled the federal standard. *See* Pet. Br. 49-50. Respondents err in disputing (at 54) that an injured person can bring a state cause of action based on a violation

of the LIA. *See supra* note 9. Their response also misses the point: so long as the state duty does not conflict with the federal duty, there is no conflict preemption. *Cf. Bates*, 544 U.S. at 447-48; 49 U.S.C. § 20106(b). And a state-law design-defect claim that is equivalent to an LIA violation would be particularly unlikely to pose an obstacle to any congressional purpose because of the well-settled distinction between failure-to-install and defective-condition cases under the LIA. *See* Pet. Br. 50-52. A state-law design-defect claim alleging that locomotive equipment was not "in proper condition and safe to operate," 49 U.S.C. § 20701(1), therefore, would not be subject to conflict preemption absent a contrary federal rule.[14]

CONCLUSION

The court of appeals' judgment should be reversed.

---

[14] Respondents incorrectly assert (at 54) that petitioners have "admit[ted] that the use of asbestos in locomotive equipment" complies with "the LIA's generic duty-of-care standard." Petitioners' claims involve risks incurred in repairing and maintaining locomotives and locomotive parts insulated with asbestos. Whether asbestos in boilers and brake shoes also poses risks to the locomotive's safe use on the line is simply not at issue here. Respondents' claim (at 1) that this case involves locomotive equipment "concededly designed and manufactured in compliance with federal regulatory standards" is thus incorrect.

Respectfully submitted,

RICHARD P. MYERS
ROBERT E. PAUL
ALAN I. REICH
MARY GILBERTSON
PAUL, REICH & MYERS, P.C.
1608 Walnut Street
Suite 500
Philadelphia, PA 19103
(215) 735-9200

October 28, 2011

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
EMILY T.P. ROSEN
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

SUPPLEMENTAL BRIEF

RECORD
AND
BRIEFS

MAY 17 2011

No. 10-879

IN THE

Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,
Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT VIAD CORP

DANIEL MARKEWICH
ELLEN G. MARGOLIS
AMY KALLAL
MOUND COTTON WOLLAN & GREENGRASS
One Battery Park Plaza
New York, New York 10004
(212) 804-4200

WALTER DELLINGER
JONATHAN D. HACKER
(Counsel of Record)
jhacker@omm.com
ANTON METLITSKY
JOANNA NAIRN*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted in Massachusetts only*

Attorneys for Respondent Viad Corp

Library of Congress
Law Library

TABLE OF CONTENTS

Page

ARGUMENT 1

A. LIA Field Preemption Extends To All State Regulation Of Locomotive Design And Construction 3

B. The Government's Brief Suggests That *Atwell* Is Not The Most Suitable Vehicle For Addressing The Question Presented..... 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Hines v. Davidowitz,
312 U.S. 52 (1941) 7

Law v. Gen. Motors Corp.,
114 F.3d 908 (9th Cir. 1997) 10

Napier v. Atl. Coast Line R.R. Co.,
272 U.S. 605 (1926) 1, 2, 5

Oglesby v. Del. & Hudson Ry. Co.,
180 F.3d 458 (2d Cir. 1999) 9

Rogers v. Mo. Pac. R.R.,
352 U.S. 500 (1957) 6

Urie v. Thompson,
337 U.S. 163 (1949) 6

STATUTES

45 U.S.C. § 51 6

49 U.S.C. § 20701 ..... passim

49 U.S.C. § 20702 5

OTHER AUTHORITIES

E. Gressman et al., *Supreme Court Practice* (9th ed. 2007) 11

SUPPLEMENTAL BRIEF FOR RESPONDENT VIAD CORP

The petition in this case is one of three similar petitions pending before this Court, all of which present the question whether the Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.*—now called the Locomotive Inspection Act (LIA)—preempts state regulation of the design of locomotives and their parts and appurtenances, as this Court held in *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926). *See also John Crane, Inc. v. Atwell*, No. 10-272 (filed Aug. 23, 2010); *Griffin Wheel Co. v. Harris*, No. 10-520 (filed Oct. 12, 2010). On November 1, 2010, this Court invited the Acting Solicitor General to file a brief expressing the views of the United States in *Atwell*. *See* 131 S. Ct. 552. That brief was filed on May 6, 2011. Respondent Viad Corp submits this supplemental brief in response.

As explained below, the government's brief urging review in *Atwell* actually makes a persuasive case for *denying* review in that case, both as a vehicle for resolving the question presented generally, and for considering the various novel preemption theories articulated in the government's brief. If this Court is inclined to examine the scope of LIA preemption, it should do so in the instant case, which presents a more appropriate factual vehicle for evaluating the competing theories now before the Court.

ARGUMENT

The LIA delegates to the Department of Transportation (DOT) authority to regulate "the locomotive or tender and its parts and appurtenances." 49

U.S.C. § 20701. In *Napier*, this Court held that because of the "broad scope of the authority conferred upon the [DOT]," the LIA "was intended to occupy the field" of regulation delegated to DOT, which the Court defined as "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." 272 U.S. at 611, 613.

The government correctly argues that no post-*Napier* acts of Congress or precedents of this Court altered the scope of LIA field preemption identified in *Napier*. U.S. Br. 19-22. The government also argues, however, that the LIA only governs the design and construction of locomotives that are *in use*, and that the statute's field preemptive scope thus extends only to claims arising from injuries sustained while the locomotive is actively being used, and not when it is being repaired off-line. That proposition is contrary to *Napier*, the LIA, and the settled law of every jurisdiction to have considered the question, save Pennsylvania. It is also contrary to common sense: the design and construction of a locomotive are the same whether it is on the track or in the repair house.

The government recognizes that common-sense problem and answers it by proposing a *new* LIA preemption rule to supplement the narrow "in use" field preemption the government describes. The government says claims concerning the design, construction, or material of a locomotive in the repair house are not field preempted under *Napier* but are *conflict* preempted, because such claims frustrate the purpose of the LIA. The distinction has never been adopted by any court, and it makes no sense: design-defect-type claims would conflict with the LIA's

purpose only because that purpose was to make regulation of locomotive design an exclusively federal matter, which is precisely the reason *Napier* held that all such claims are *field* preempted.

Finally, the government proposes yet another new wrinkle on LIA preemption. It contends that failure-to-warn claims (unlike design defect claims) are neither field nor conflict preempted, because such claims would not literally require manufacturers to alter the design or construction of the locomotive. That distinction, too, is untenable. Every claim seeking to establish liability for a given locomotive design choice can be recast as a claim to establish liability for failing to give a proper warning about that design choice. The point of the LIA is to prohibit states from establishing and enforcing their own legal standards concerning locomotive design, which is exactly what a state does when it decides that a particular design is unlawful unless accompanied by the state's own chosen warning.

A. LIA Field Preemption Extends To All State Regulation Of Locomotive Design And Construction

The government agrees with Viad that the LIA preempts the regulatory field of locomotive design and construction, but asserts that the field extends only to locomotives that are actively "in use" at the time a claimant's injury is sustained. That does not mean, however, that state-law claims concerning locomotive design arising from injuries sustained when the locomotive is *not* in use are free to proceed. Those claims, too, are preempted, the government contends, because they conflict with the LIA's pur-

pose of making locomotive design exclusively subject to federal regulation. Yet failure-to-warn claims arising from off-line injuries—even claims asserting failure to warn of a defective design—are *not* conflict preempted on the government's view. These complicated distinctions are unprecedented, unnecessary, and unsupported by the statute's text and purpose.

1. The government's principal contention is that the LIA preempts the field of claims based on injuries arising when a locomotive is in use, but not when it is being repaired. U.S. Br. 11-18. The government asserts that the LIA regulates only locomotives and locomotive parts actively in use. U.S. Br. 11-13. And since the "preempted field is coextensive with the regulated field," field preemption "encompasses only claims based on injuries arising from operational locomotives." U.S. Br. 13.

The government is correct that the scope of field preemption is determined by the scope of the regulated field. But the pertinent regulated field here is defined by the regulatory authority delegated to DOT, which is *not* restricted to regulating only locomotives actively being used.

a. The government's argument that the "LIA regulates only the *use* on railroad lines of locomotives or tenders and their parts and appurtenances," U.S. Br. 11 (emphasis added), rests wholly on the first portion of the relevant LIA provision, which says that "[a] railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances ... are in proper condition and safe to

operate without unnecessary danger of personal injury." 49 U.S.C. § 20701(1).

That provision sets forth the standard of care applicable to "railroad carrier[s]." But, as the government acknowledges, the field preemptive scope of the LIA is defined not by the duties it imposes on railroads, but by the authority it delegates to DOT. U.S. Br. 13. The provision cited by the government does not address DOT's regulatory authority. That authority is broader than the standard of care imposed on railroad carriers—it wholly encompasses "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611; *see, e.g*, 49 U.S.C. § 20701(2) (requiring DOT to prescribe standards for inspection); *id.* § 20702(a)(3) (requiring DOT to "ensure that every railroad carrier makes inspections of locomotives and tenders and their parts and appurtenances ... and repairs every defect that is disclosed by an inspection before a defective locomotive, tender, part, or appurtenance is used again").

In the context of DOT's regulatory authority, the "in use" requirement of the standard of care is irrelevant, because a locomotive's design and construction are the same whether the locomotive is in use or not. A state obviously could not enact a statute requiring locomotives to be constructed entirely from a particular type of material, and then circumvent the LIA by issuing citations for violations of the statute only against locomotives parked in repair stations. A state just as obviously could not enact a statute prohibiting the use of a particular material—such as asbestos—in locomotive construction, avoiding the LIA by simply enforcing the statute only against lo-

comotives being repaired off line. But that is precisely the effect of the United States' contention that LIA field preemption is categorically inapplicable to locomotives parked for repairs.

The government makes the same mistake in relying on cases concerning the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.* That statute permits an injured railroad worker to recover compensatory damages from his employer (i.e., the railroad, not the locomotive equipment manufacturer) when the employer's "negligence played any part, even the slightest, in producing the injury." *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 506 (1957). And a worker can establish negligence per se under FELA by proving a violation of the LIA or other rail safety statute. *Urie v. Thompson*, 337 U.S. 163, 189 (1949). In FELA claims seeking to establish per se liability because of violations of the LIA, the courts of appeals have held that a railroad is per se liable only when the injury was sustained when the locomotive was "in use." U.S. Br. 12-13 (citing cases).

The "in use" requirement makes sense in the FELA context. FELA establishes a tort action against a railroad, and the scope of the railroad's per se liability is defined by the standard of care prescribed by the LIA. And, as explained, the standard of care established in the LIA applies only to the "use[]" and "operat[ion]" of the locomotive. 49 U.S.C. § 20701(1). But as also explained, preemption does not arise from the LIA's standard of care—it arises from delegation to DOT of exclusive regulatory authority over locomotive design and construction. And nothing in the LIA restricts DOT to regulating locomotive design and construction only while the

locomotive is actively being used. Federal regulations concerning those matters are not suspended at the roundhouse door.[1]

2. The government appears to recognize that it is senseless to preempt state regulation of locomotive design only when the locomotive is in use. To make its rule defensible, the government argues that while state-law claims involving repair-station injuries arising from the design of the locomotive are not *field* preempted, they are *conflict* preempted, because any claim based on locomotive design would frustrate the LIA's objectives. U.S. Br. 16-17 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Failure-to-warn claims, in contrast, apparently would be open to state regulation. U.S. Br. 17. The govern-

---

[1] The government says that if claims based on injuries sustained in a repair station are preempted, then certain persons who suffer injuries there due to a locomotive's design or construction—i.e., contractors and third parties, or railroad employees who cannot prove simple negligence by their employers under FELA—would have no remedy for their injuries. U.S. Br. 13-15. But as the government recognizes, "[d]epriving injured individuals of a remedy may be justified when allowing a remedy would prevent the LIA from achieving its purposes," U.S. Br. 15, and the purpose of the LIA was to preclude states from regulating any aspect of locomotive design and construction. The government itself concedes that a contractor or third party outside the scope of FELA lacks a remedy against a manufacturer for design- and construction-related injuries occurring on line—the government does not explain why it makes "practical sense" (U.S. Br. 13) to treat those asserting injuries in the roundhouse differently. As for employee claims under FELA, the employer's negligence need only play the "slightest" part in the injury. *See supra* at 6. Given that easily-satisfied standard, there is no need to distort settled LIA preemption doctrine to provide railroad employees with claims against locomotive manufacturers.

ment's proposed conflict preemption rule is a field preemption rule by another name, and its distinction between design defect and failure-to-warn claims is untenable.

a. The government's proposed conflict preemption rule—which has never been adopted or even considered by any court—merely demonstrates the error of its primary position, *viz.*, that the field-preemptive scope of the LIA reaches only claims stemming from injuries sustained when the locomotive is in use. On the government's view, *every* claim based on locomotive design, construction, or material, while not field preempted, would still be conflict preempted because it would frustrate the objectives underlying the LIA. But that can be true only if the LIA's objective was to ensure that DOT—and not the states—was the exclusive source of legal standards governing locomotive design, construction, and material, irrespective of whether the locomotive happens to be "in use" at the time a legal standard is applied. In other words, the government's theory that a state law regulating locomotive design in repair shops conflicts with the LIA necessarily refutes its theory that the regulatory field occupied by the LIA is limited only to locomotives actively in use.

b. The government's proposed distinction between design defect claims (which it says are conflict preempted) and failure-to-warn claims (which are not) also does not survive scrutiny. The government contends that accepting a failure-to-warn claim "would not require manufacturers of locomotives or railroads to alter the design or construction of their locomotives." U.S. Br. 17. That distinction is misleading at best: while a failure-to-warn claim may

not itself literally mandate alteration of the design or construction of a locomotive, it comes to the same place, because the claim still (a) involves differing state-created standards for lawful locomotive design and manufacture, and (b) imposes liability under state law for violation of those standards.

It is clear that, if failure-to-warn claims were permissible, "states could promulgate otherwise pre-empted safety regulations in the guise of instructional labels and then create causes of action for injured workers if railroads failed to post them." *Oglesby v. Del. & Hudson Ry. Co.*, 180 F.3d 458, 461 (2d Cir. 1999). Such claims thus directly contradict the LIA's objective of precluding states from imposing their own "differing requirements concerning locomotive design and construction." U.S. Br. 17. If states lack authority to decide that certain locomotive designs are unlawfully dangerous, they cannot have authority to decide that such designs are unlawfully dangerous if implemented without state-prescribed warnings.

Failure-to-warn claims also raise the same concerns about conflicting state standards that design defect claims raise. Because repairs to locomotives may need to take place at any time, locomotives would need to be equipped with warnings that are sufficient in every state through which they travel. But states may require different formulations of the same warning, and a warning that one state mandates might be viewed by another as unnecessarily cluttering a warning label and thus affirmatively reducing the effectiveness of its own required warnings. And even if it were possible to comply simultaneously with every state's warning requirements,

the state with the most stringent requirements would effectively be able to impose its law as a nationwide standard, which is exactly what Congress sought to avoid by enacting the LIA. *See, e.g., Law v. Gen. Motors Corp.*, 114 F.3d 908, 910-11 (9th Cir. 1997).[2]

B. The Government's Brief Suggests That *Atwell* Is Not The Most Suitable Vehicle For Addressing The Question Presented

The LIA applies only to "the locomotive or tender and its parts and appurtenances." 49 U.S.C. § 20701. But as the government observes, the trial court in *Atwell* found that the materials that allegedly caused the injury in that case were not locomotive parts and appurtenances, and thus were not subject to the preemptive effect of the LIA, whatever its scope. U.S. Br. 17. The government says that locomotive parts and appurtenances do not "include generic materials that require modification before they are suitable for use on locomotives," and the materials manufactured by John Crane, Inc. "appear to fall into that category of generic materials." *Id.* at 18.

The United States nonetheless urges the Court to grant John Crane's petition for certiorari: "Because the claims are outside the field based on the 'in use'

---

[2] The government might mean to exclude from conflict preemption only failure-to-warn claims involving "materials used to repair locomotives" (U.S. Br. 17), but it is not clear why such claims would even implicate the LIA in the first place—unless those materials are "parts and appurtenances," in which case the LIA precludes states from imposing warning standards on their design and construction.

requirement [of the LIA], this Court need not address [whether John Crane's products are parts or appurtenances] if it grants review." *Id.* at 17. This Court, however, normally does not grant review when its decision would not likely affect the outcome of the case. E. Gressman et al., *Supreme Court Practice* 504 (9th ed. 2007). If the government and the *Atwell* trial court are correct, nothing this Court said about the scope of LIA preemption would affect the ultimate disposition of *Atwell*, because the LIA would not apply at all to the claims in that case.

That problem does not exist in the instant case. Viad Corp is the alleged successor-in-interest to a company that manufactured the entire locomotive, not just components that may or may not qualify as parts or appurtenances under the LIA. The proper scope of LIA preemption is thus unavoidably presented in this case.

What is more, the government's error in asserting that failure-to-warn cases are not preempted may be a product of the particular facts of *Atwell*, which appears to concern products that "required cutting and other manipulation before they could be installed on locomotives." U.S. Br. 18. The government suggests that imposing warning requirements on such products does not threaten the ability of locomotives to move freely across state lines. That position is dubious on its own terms, but it becomes fantastical when applied in the context of a case like this one involving an entire locomotive. The government does not explain how a manufacturer could attach labels to the locomotive sufficient to satisfy the varying laws—typically, unwritten tort laws—of every state the locomotive might travel through. Indeed,

that is why the LIA reaches only locomotives and their parts and appurtenances, which *by necessity* travel across state borders. If this Court is inclined to address the government's new preemption theories, it should do so in a case that involves an entire locomotive, and thus presents those theories in the sharpest relief.

CONCLUSION

Certiorari should be granted, and the judgment below should be affirmed.

Respectfully submitted,

DANIEL MARKEWICH
ELLEN G. MARGOLIS
AMY KALLAL
MOUND COTTON WOLLAN & GREENGRASS
One Battery Park Plaza
New York, New York 10004
(212) 804-4200

WALTER DELLINGER
JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
ANTON METLITSKY
JOANNA NAIRN*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
*Admitted in Massachusetts only

May 17, 2011

SUPPLEMENTAL BRIEF

Supreme Court, U.S.
FILED
MAY 18 2011
OFFICE OF THE CLERK

No. 10-879

In the Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT RAILROAD FRICTION PRODUCTS CORPORATION

JAMES C. MARTIN
Counsel of Record
JOHN L. VITSAS
DAVID J. BIRD
ROBERT H. OWEN
Reed Smith LLP
225 Fifth Ave.
Pittsburgh, PA 15222
(412) 288-3131
jcmartin@reedsmith.com

Counsel for Respondent Railroad Friction Products Corporation

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement for Respondent Railroad Friction Products Corporation ("RFPC") made pursuant to Supreme Court Rule 29.6 and set forth in RFPC's brief in opposition remains current, with no amendment necessary.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

ARGUMENT 2

I. Because Of Congress's Broad Delegation Of Regulatory Power To The Secretary, The LIA Preempts All State Regulations Directed To The Design, Construction, And Material Of Railroad Equipment And Parts. 2

II. There Is No Entrenched And Irreconcilable Conflict Among The Federal Courts Of Appeals Or The State Courts Of Last Resort Regarding The Question Presented 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Consol. Rail Corp. v. Pa. Pub. Util. Comm'n,
536 F. Supp. 653 (E.D. Pa. 1982) 9

Frastaci v. Vapor Corp.,
70 Cal. Rptr. 3d 402 (Cal. Ct. App. 2007) 7

Kurns v. A.W. Chesterton, Inc.,
620 F.3d 392 (3d Cir. 2010) 7

Law v. Gen. Motors Corp.,
114 F.3d 908 (9th Cir. 1997) 6

Napier v. Atl. Coast Line R.R. Co.,
272 U.S. 605 (1926) ..... passim

Oglesby v. Del. & Hudson Ry. Co.,
180 F.3d 458 (2d Cir. 1999) 5, 6

Seaman v. A.P. Green Indus., Inc.,
707 N.Y.S.2d 299 (N.Y. Sup. Ct. 2000) 7

Urie v. Thompson,
337 U.S. 163 (1949) 7

STATUTES

45 U.S.C. §§ 51, et seq. 7

45 U.S.C. § 53 7

45 U.S.C. § 54 7

49 U.S.C. § 20701(1) 8

49 U.S.C. § 21302 3

REGULATIONS

49 C.F.R. § 210.27(d)(3) 6
49 C.F.R. § 215.9(a)(3) 6
49 C.F.R. § 229.7(b) 3
49 C.F.R. § 229.21-229.33 3
49 C.F.R. § 229.85 6
49 C.F.R. § 229.113 6

On May 6, 2011, the federal government filed an amicus curiae brief in *John Crane, Inc., v. Atwell*, No. 10-272, which recommends that the Court: (1) grant the petition for a writ of certiorari filed by John Crane, Inc.; (2) hold the petitions in this case and *Griffin Wheel, Inc. v. Harris*, No. 10-520, pending *Atwell*'s disposition; and (3) affirm the decision of the Superior Court of Pennsylvania in *Atwell*.

With respect to the last point, the government concedes that the Pennsylvania superior court's decision in *Atwell* is "erroneous" in holding that various acts of Congress and precedents from this Court have narrowed the preemptive effect of the Locomotive Inspection Act ("LIA") on state law. U.S. Br. 10, 19-22. Nevertheless, the government recommends that the superior court's decision be affirmed on the alternate ground that the field preempted by the LIA does not encompass state-law tort claims based on exposure to asbestos during the repair of locomotive parts and equipment at railroad maintenance facilities, while the parts and equipment are not in use on a railroad line. U.S. Br. 11-18. RFPC submits this supplemental brief in response.

There are a number of glaring problems with the government's novel arguments concerning the preemptive effect of the LIA on state-law tort claims. The most fundamental of these is that there is no clear and irreconcilable conflict among the circuit courts and state courts of last resort on the question presented, even as re-framed by the government. Here, the government's arguments only serve to underscore why the question presented does not warrant this Court's attention at this time.

ARGUMENT

I. Because Of Congress's Broad Delegation Of Regulatory Power To The Secretary, The LIA Preempts All State Regulations Directed To The Design, Construction, And Material Of Railroad Equipment and Parts.

1. To begin with, the government's novel and convoluted view of the LIA's preemptive effect conflicts with this Court's reasoning and holding in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 613 (1926).

a. In *Napier*, this Court considered the field occupied by the LIA and the LIA's preemptive effect on state laws "directed to ... the equipment of locomotives." 272 U.S. at 611-13. The Court held that: (1) through the LIA, Congress conferred on the Interstate Commerce Commission (and now to the Secretary of Transportation, and his delegate, the Federal Railroad Administration ("FRA")) the "general" power to regulate the safety of locomotive equipment; (2) the federal regulator's delegated power extended "to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances;" and (3) the "broad scope" of the LIA's delegation of power to the federal regulator led to the conclusion that the LIA was intended to occupy the entire field of regulation concerning locomotive equipment and preempt all state laws falling within the scope of the regulator's authority. *Id.*

The Court also noted that the broad delegation of these powers to the federal regulator meant that any state law "directed to the same subject—the

equipment of locomotives"—was preempted, regardless of whether the regulator actually had exercised its powers. *Id.*

b. The "field" occupied by the LIA, thus, is defined in terms of the federal regulator's broad power over "the design, the construction, and the material" of physical objects that may be put to use on a railroad line—*i.e.*, "every *part* of the locomotive and tender and of all appurtenances." *Id.* (emphasis added). The Secretary's broad regulatory power does not vary depending on the transitory condition or location of a particular part or piece of equipment—*i.e.*, on whether a particular part or piece of equipment happens to be "on" or "off" the line or "in" or "out" of use at any moment. Of necessity, the design, construction, and material of all parts and equipment are first fixed, *off-line*, in *advance* of parts and equipment being put to use on a railroad line, and the design, construction, and material of such parts and equipment remains the same, both on and off the line. Indeed, there is no dispute that the LIA grants the Secretary regulatory power over *many* conditions and activities that occur in advance of parts and equipment first being put to use on the line, including regulatory power over manufacturers, who design, construct, and sell parts and equipment, off-line, for subsequent use on the line. *See* 49 U.S.C. § 21302; 49 C.F.R. §§ 229.7(b), 229.21-229.33 (collectively requiring daily inspections and periodic testing of various parts and subjecting "manufacturer[s] ... of railroad equipment" to penalties).

c. The government appears to agree that: (1) the LIA provides the Secretary with the power to

regulate the design, construction, and material of railroad parts and equipment in advance of the use of such parts and equipment on a railroad line; (2) the design, construction, and material of such parts and equipment "remain the same" whether or not the parts or equipment happen to be in use at any given moment; (3) state-law tort claims based on exposure to asbestos-containing materials in parts and equipment are directed, in purpose and effect, at the same "subject" as the LIA—namely, the "design, construction, and material" of those parts and equipment; and (4) state-law tort claims based on such exposure to asbestos-containing materials in parts and equipment "conflict" with the LIA, even when the exposure allegedly occurs during the repair of parts and equipment at railroad maintenance facilities, while parts and equipment are not in use. U.S. Br. 15-17 (conceding that such state-law tort claims would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [the LIA]") (first alteration in the original).

Nevertheless, the government inexplicably contends that state-law tort claims based on exposure to asbestos-containing materials during the repair of locomotive parts and equipment lie outside the LIA's regulatory "field," as described in *Napier*. This is a non-sequitur, pure and simple. Under *Napier*, if the LIA gives the Secretary the power to regulate asbestos-containing material in the design and construction of locomotive parts and equipment, before any part or piece of equipment actually is put to use on a railroad line (as the government concedes that the statute does), then the LIA also must be construed to preempt state tort laws directed to that

same subject—*i.e.*, asbestos-containing material in the design and construction of locomotive parts and equipment, before any part or piece of equipment is put in use on a railroad line.

And, the LIA must be construed to have this preemptive effect on state law, regardless of whether the Secretary has exercised his powers on this subject and promulgated specific regulations that squarely conflict with the "object" of the state-law claims. *Compare Napier*, 272 U.S. at 611-13 (holding that the LIA preempts state laws that are "directed to" the design, construction and material of "locomotive equipment," regardless of whether the federal regulator actually has exercised its powers) *with* U.S. Br. 16-18 (suggesting that the preemption of state-law claims may depend on whether the "legal theory" underlying the claim "actually" conflicts with the LIA and federal regulations thereunder); *see also Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458, 461 (2d Cir. 1999) ("[A]ny state law that attempts to regulate within the domain is preempted," and the "relevant question" for preemption under the LIA "is not whether the federal government has exercised its authority [to regulate the subject of the claim] but whether it possesses the power in the first place.").

Under *Napier*, nothing more is, or should be, required to support the conclusion that the LIA preempts state-law tort claims based on exposure to asbestos-containing materials during the repair of locomotive parts and equipment at railroad maintenance facilities.

The same, plain reading of *Napier* also demonstrates that the government is just as wrong when it posits a possible distinction between the

LIA's preemptive effect on state-law tort claims based on exposure to asbestos and those based on a failure to warn about the design, construction, and material of parts and equipment containing asbestos. Under the LIA, the Secretary has the power to regulate not only the presence and use of asbestos-containing material in the design and construction of parts and equipment, but also the warnings that must be given along with such parts and equipment. Indeed, the Secretary often has exercised that power to direct warnings along with parts and equipment. *See, e.g.*, 49 C.F.R. §§ 210.27(d)(3) (labeling requirement for wayside noise levels), 215.9(a)(3) (warning posted on defective freight cars), 229.85 (warning notices for high voltage equipment), 229.113 (warning notices for steam generators), *cited in Law v. Gen. Motors Corp.*, 114 F.3d 908, 911 (9th Cir. 1997) (failure-to-warn claims within the regulatory field occupied by the LIA and delegated to the Secretary and his designee).

Moreover, as lower courts uniformly have recognized, if failure-to-warn claims are deemed to be outside the regulatory field of the LIA, "states could promulgate otherwise preempted safety regulations in the guise of instructional labels and then create causes of action for injured workers if railroads failed to post them." *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458, 461 (2d Cir. 1999). This is precisely what *Napier* and its progeny say is the exclusive regulatory domain of the federal government and something a state cannot touch.

2. The application of *Napier* and the LIA to state-law tort claims "directed to" asbestos-containing material in the design and construction of railroad

parts and equipment is straightforward and logical, and not "artificial[]" in any respect. *See* U.S. Br. 16. That is why courts repeatedly have rejected the narrowing argument advanced by the government and held that the LIA's preemptive effect on state law does not depend on whether railroad parts and equipment are actually "in use" at the time of the alleged exposure to asbestos. *See, e.g.*, *Kurns v. A.W. Chesterton, Inc.*, 620 F.3d 392, 396 n.5 (3d Cir. 2010), *reprinted in* App. 6a-21a; *Frastaci v. Vapor Corp.*, 70 Cal. Rptr. 3d 402, 409-411 (Cal. Ct. App. 2007); *Seaman v. A.P. Green Indus., Inc.*, 707 N.Y.S.2d 299, 302 (N.Y. Sup. Ct. 2000).

In fact, no court of appeals or state court of last resort *ever* has embraced the novel and convoluted theory of LIA field preemption that the government now advances. In its brief, the government grounds its theory primarily on cases decided under the Federal Employers' Liability Act ("FELA"), now codified at 45 U.S.C. §§ 51, et seq. U.S. Br. 12-13 (citing cases). FELA provides an injured railroad employee with a cause of action to recover compensatory damages from a railroad when the railroad's negligence plays any part in causing an injury. Neither the assumption of the risk nor the contributory negligence of the employee is a defense to a railroad's FELA liability. 45 U.S.C. §§ 53, 54. And an injured railroad employee can establish negligence per se under FELA by proving that a railroad allowed parts and equipment to be used on its line without being in a proper and safe condition in compliance with the LIA or another railroad safety statute. *Urie v. Thompson*, 337 U.S. 163, 189 (1949).

In cases arising under this remedial regime, courts have held that a finding of negligence per se is permissible only when there are allegations and evidence that a part or piece of equipment was "in use" on the line when the injury occurred. U.S. Br. 12-13 (citing cases). That rule makes sense given the language of the relevant statutes defining the specific duty of care imposed on railroads under the LIA. *See* 49 U.S.C. § 20701(1).

But the preemptive effect of the LIA is a consequence not of the duty of care that the LIA imposes on railroad carriers, but the statute's broad delegation to the Secretary of exclusive power to regulate the design, construction, and material of parts and equipment. Moreover, as noted above, nothing in the LIA conditions the Secretary's regulatory power over design, construction, and material to those transitory periods when parts and equipment are actively being used on the line.

Simply put, *none* of the government's cited cases even implicates, much less undertakes to resolve, the scope of LIA field preemption under *Napier*. Accordingly, none provides evidence of a clear or irreconcilable conflict among the court of appeals or state courts of last resort over the scope of LIA field preemption or demonstrates any need for this Court's intervention.

II. There Is No Entrenched And Irreconcilable Conflict Among The Federal Courts Of Appeals Or The State Courts Of Last Resort Regarding The Question Presented.

In its Brief in Opposition, RFPC urged the Court to deny the petitions pending in *Atwell*, *Harris*, and

this case (*Kurns*) because "there is no irreconcilable conflict among the federal courts of appeals or the state courts of last resort on the LIA's preemptive reach." RFPC Br. 5-13 (noting that since this Court's summary affirmance in *Consol. Rail Corp. v. Pa. Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983), no federal court of appeals or state court of last resort has called LIA's preemptive reach into question and that a solid phalanx of federal and state court decisions have applied *Napier* and its progeny uniformly).

The government's amicus brief proves RFPC's point: No matter how one frames the question presented, there is no conflict among the courts of appeals or the state courts of last resort concerning the LIA's preemptive effect on these state-law tort claims.

What is more, there is no dispute that the decision of the Third Circuit in this case provides a comprehensive and definitive declaration of the preemptive principles that will control federal courts in Pennsylvania—a declaration that likely will be influential in any subsequent analysis of the preemption issues undertaken by Pennsylvania's state courts or other federal or state courts.

This Court's consideration of the question presented, accordingly, should wait until other circuit courts and state courts of last resort, including in Pennsylvania, have had an opportunity to consider the Third Circuit's dispositive opinion in this case, as well as the novel arguments now advanced by the government. If a real conflict arises and ripens among the circuit courts and state courts of last

resort concerning the question presented, the Court can intervene to resolve that conflict in a future case that presents the question of the LIA's preemptive effect in a clearer and cleaner factual and legal context. *See* RFPC Br. 12-13.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

May 18, 2011

JAMES C. MARTIN
Counsel of Record
JOHN L. VITSAS
DAVID J. BIRD
ROBERT H. OWEN
Reed Smith LLP
225 Fifth Ave.
Pittsburgh, PA 15222
Tel: (412) 288-3131
Fax: (412) 288-3063
E-mail:
jcmartin@reedsmith.com
Counsel for Respondent
Railroad Friction
Products Corporation

AMICUS CURIAE BRIEF

No. 10-879

In the Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL., PETITIONERS

v.

RAILROAD FRICTION PRODUCTS CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

ROBERT S. RIVKIN
General Counsel
PAUL M. GEIER
Assistant General Counsel for Litigation
PETER J. PLOCKI
Deputy Assistant General Counsel for Litigation
Department of Transportation
Washington, D.C. 20590

KAREN J. HEDLUND
Chief Counsel
MICHAEL T. HALEY
Deputy Chief Counsel
STEPHEN N. GORDON
Trial Attorney
Federal Railroad Administration
Washington, D.C. 20590

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
DOUGLAS N. LETTER
ABBY C. WRIGHT
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Locomotive Inspection Act, 49 U.S.C. 20701 *et seq.*, preempts state-law tort claims based on an individual's exposure to asbestos-containing materials during the repair of locomotives at railroad maintenance facilities.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 11
Argument 12
A. Petitioners' claims are not within the field pre-empted by the Locomotive Inspection Act 13
1. The LIA applies only to the use on railroad lines of a locomotive or tender and its parts and appurtenances 13
2. The scope of the field the LIA preempts is coextensive with the scope of the field the LIA regulates 16
B. Some of petitioners' claims may nevertheless be preempted to the extent they conflict with the LIA 22
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Angell v. *Chesapeake & Ohio Ry.*, 618 F.2d 260 (4th Cir. 1980) 15
Baltimore & Ohio R.R. v. *Groeger*, 266 U.S. 521 (1925) 14, 18, 24, 25
Barnett Bank of Marion County, N.A. v. *Nelson*, 517 U.S. 25 (1996) 23
Bates v. *Dow Agrosciences LLC*, 544 U.S. 431 (2005) 22
Brady v. *Terminal R.R.*, 303 U.S. 10 (1938) 15, 16
Crane v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164 (1969) 19

Cases—Continued: Page

Crockett v. *Long Island R.R.*, 65 F.3d 274 (2d Cir. 1995) 15

Crosby v. *National Foreign Trade Council*, 530 U.S. 363 (2000) 6

CSX Transp., Inc. v. *Easterwood*, 507 U.S. 658 (1993) 9

Engine Mfrs. Ass'n v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) 28, 29

English v. *General Elec. Co.*, 496 U.S. 72 (1990) 6

Engvall v. *Soo Line R.R.*, 632 N.W. 2d 560 (Minn. 2001) 20

Estes v. *Southern Pac. Transp. Co.*, 598 F.2d 1195 (10th Cir. 1979) 15

Fairport, Painesville & E. R.R. v. *Meredith*, 292 U.S. 589 (1934) 19

First Sec. Bank v. *Union Pac. R.R.*, 152 F.3d 877 (8th Cir. 1998) 24

Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 6

Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) 2

Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) 6

Herold v. *Burlington N., Inc.*, 761 F.2d 1241 (8th Cir.), cert. denied, 474 U.S. 888 (1985) 19

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 6, 23

Illinois Cent. R.R. v. *ICC*, 206 U.S. 441 (1907) 16

Kelley v. *Southern Pac. Co.*, 419 U.S. 318 (1974) 19

Law v. *General Motors Corp.*, 114 F.3d 908 (9th Cir. 1997) 24

Lilly v. *Grand Trunk W. R.R.*, 317 U.S. 481 (1943) 23

Cases—Continued: Page

Marshall v. *Burlington N., Inc.*, 720 F.2d 1149 (9th Cir. 1983) 21

McGrath v. *Consolidated Rail Corp.*, 136 F.3d 838 (1st Cir. 1998) 15

Moore v. *Chesapeake & Ohio Ry.*, 291 U.S. 205 (1934) 8

Napier v. *Atlantic Coast Line R.R.*, 272 U.S. 605 (1926) ..... *passim*

Norfolk S. Ry. v. *Sorrell*, 549 U.S. 158 (2007) 19

Northwest Airlines, Inc. v. *Transport Workers Union*, 451 U.S. 77 (1981) 20

Northwest Cent. Pipeline Corp. v. *State Corp. Comm'n*, 489 U.S. 493 (1989) 22

Oglesby v. *Delaware & Hudson Ry.*, 180 F.3d 458 (2d Cir.), cert. denied, 528 U.S. 1004 (1999) 23, 26

Pacific Gas & Elec. Co. v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) 6

Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) 8, 23

Southern Ry. v. *Lunsford*, 297 U.S. 398 (1936) 3

Steer v. *Burlington N., Inc.*, 720 F.2d 975 (8th Cir. 1983) 15

Swift & Co. v. *Wickham*, 230 F. Supp. 398 (S.D.N.Y. 1964) 23

Tipton v. *Atchison, Topeka & Santa Fe Ry.*, 298 U.S. 141 (1936) 8, 18

Tisneros v. *Chicago & N.W. Ry.*, 197 F.2d 466 (7th Cir.), cert. denied, 344 U.S. 885 (1952) 15

United States v. *Baltimore & Ohio R.R.*, 293 U.S. 454 (1935) 4, 15

United States v. *Locke*, 529 U.S. 89 (2000) 13, 16, 23

Cases—Continued: Page

United Transp. Union v. *Long Island R.R.*, 455 U.S. 678 (1982), overruled in part on other grounds, *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) 2, 23
Urie v. *Thompson*, 337 U.S. 163 (1949) 6, 18
Wright v. *Arkansas & Mo. R.R.*, 574 F.3d 612 (8th Cir. 2009) 15

Statutes and regulations:

Act of Mar. 2, 1893, ch. 196, 27 Stat. 531 2
Act of Mar. 2, 1903, ch. 976, 32 Stat. 943 2
Act of Apr. 14, 1910, ch. 160, 36 Stat. 298 2
Act of Mar. 4, 1915, ch. 169, § 1, 38 Stat. 1192 3
Act of July 5, 1994, § 7(b), 108 Stat. 1380 28
Boiler Inspection Act, ch. 103, 36 Stat. 913 ..... 2, 23
§ 2, 36 Stat. 913-914 2
§ 6, 36 Stat. 915 4
Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931:
§ 5(e)(1)(E), 80 Stat. 939 4
§ 5(e)(1)(F), 80 Stat. 939 4
Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* 5
45 U.S.C. 51 ..... 5, 20
45 U.S.C. 53 6
45 U.S.C. 54 6

Statutes and regulations—Continued: Page

Federal Railroad Safety Act of 1970, 49 U.S.C. 20102 *et seq.* 5
49 U.S.C. 20103(a) 5, 21
49 U.S.C. 20106 (2006 & Supp. III 2009) 9
49 U.S.C. 20106(a)(1) (Supp. III 2009) 8, 21, 24
49 U.S.C. 20106(a)(2) (Supp. III 2009) 9, 21
49 U.S.C. 20106(b) (Supp. III 2009) 9
49 U.S.C. 20106(b)(1) (Supp. III 2009) 9
49 U.S.C. 20302 15
49 U.S.C. 21302(a) (2006 & Supp. III 2009) 4
49 U.S.C. 21302(a)(1) 4, 28
Interstate Commerce Act, ch. 104, 24 Stat. 379 2
Locomotive Inspection Act, 49 U.S.C. 20701 *et seq.* 1, 3
49 U.S.C. 20701 ..... 3, 14, 15, 17, 18
49 U.S.C. 20701(1) 12, 25
49 U.S.C. 20701(2) 4
Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* 5
29 U.S.C. 652(8) 5
29 U.S.C. 653(b)(1) 5
29 U.S.C. 653(b)(4) 5
29 U.S.C. 655 5
Rail Safety Enforcement and Review Act, Pub. L. No. 102-365, § 9(a)(8), 106 Stat. 978 28
Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, 102 Stat. 626:
§ 14(7)(A), 102 Stat. 633 27
§ 14(7)(B), 102 Stat. 633 4

Statutes and regulations—Continued: Page

42 U.S.C. 7543(a) 28
45 U.S.C. 23 (1946) 14
49 U.S.C. 20101 5
49 C.F.R.:
Pt. 210:
Section 210.27 18
Pt. 215:
Section 215.9(a) 18
Pt. 227 5
Pt. 229 ..... 5, 18
Section 229.5 4
Section 229.7(b) 4
Section 229.113 18
Pt. 230 5
Pt. 232 5
Pt. 238 5
43 Fed. Reg. 10,583-10,590 (1978) 21
53 Fed. Reg. 28,601 (1988) 4, 28

Miscellaneous:

ICC, *Inspection of Locomotive Boilers: Report of the Commission to the Senate*, 73 I.C.C. 761 (Aug. 29, 1922) 15
FRA, *Locomotive Crashworthiness and Cab Working Conditions: Report to Congress* (Sept. 1996) 26
Webster's New International Dictionary of the English Language (1917) 4

In the Supreme Court of the United States

No. 10-879

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL., PETITIONERS

v.

RAILROAD FRICTION PRODUCTS CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether the Locomotive Inspection Act, 49 U.S.C. 20701 *et seq.*, preempts state-law tort claims based on an individual's exposure to asbestos-containing materials during the repair of locomotives at maintenance facilities. The United States has a substantial interest in the regulation of the railroad industry and the proper scope of preemption under federal railroad safety laws. In response to this Court's invitation, the United States filed a brief on May 6, 2011, urging this Court to grant the petition for writ of certiorari in *John Crane, Inc.* v. *Atwell*, No. 10-272, which presents the same question as this case presents.

STATEMENT

1. a. The federal government has long exercised a significant role in regulating the railroad industry. At the turn of the 20th century, recognizing "that a uniform regulatory scheme [was] necessary to the operation of the national rail system," *United Transp. Union* v. *Long Island R.R.*, 455 U.S. 678, 688 (1982), overruled in part on other grounds, *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), Congress enacted a series of laws regulating railroad operations. In 1887, for example, Congress enacted a law requiring, *inter alia*, that railroads charge "reasonable and just" fees for services rendered in relation to interstate commerce. See Interstate Commerce Act, ch. 104, 24 Stat. 379. Congress also enacted a series of laws—known collectively as the Safety Appliance Act (SAA)—imposing on railroads specific equipment-related safety requirements. See Act of Mar. 2, 1893, ch. 196, 27 Stat. 531 (requiring, *e.g.*, "common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes"), as amended by Act of Mar. 2, 1903, ch. 976, 32 Stat. 943 (requiring, *e.g.*, that whenever "any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train"), as supplemented by Act of Apr. 14, 1910, ch. 160, 36 Stat. 298 (requiring, *e.g.*, that all railroad cars subject to the Act "be equipped with secure sill steps and efficient hand brakes").

b. In 1911, Congress enacted the Boiler Inspection Act, ch. 103, 36 Stat. 913, which imposed a general requirement that locomotives be safe to operate. The Act made it unlawful for common carriers "to use any loco-

motive engine propelled by steam power in moving interstate or foreign traffic unless the boiler" and its appurtenances were "in proper condition and safe to operate" in "active service." § 2, 36 Stat. 913-914. Shortly thereafter, Congress amended the Boiler Inspection Act to apply the safety requirement to "the entire locomotive and tender and all parts and appurtenances thereof," Act of Mar. 4, 1915, ch. 169, § 1, 38 Stat. 1192. As amended, the statute became known as the Locomotive Inspection Act (LIA), codified at 49 U.S.C. 20701 *et seq.* In its current form, the LIA provides:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
>
> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

49 U.S.C. 20701. The LIA's coverage of "parts and appurtenances" extends to "[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order" under the LIA. *Southern Ry.* v. *Lunsford*, 297 U.S. 398, 402 (1936).[1]

---

[1] A "locomotive" is "a piece of on-track equipment * * * (1) With one or more propelling motors designed for moving other equipment; (2) With one or more propelling motors designed to carry freight or passenger traffic or both; or (3) Without propelling motors but with one

The LIA originally vested in the Interstate Commerce Commission (ICC) the "authority to prescribe by rule specific devices, or changes in the equipment" used on locomotives, "where these are required to remove 'unnecessary peril to life or limb.'" *United States* v. *Baltimore & Ohio R.R.*, 293 U.S. 454, 462-463 (1935); see § 6, 36 Stat. 915. In 1966, that authority was transferred to the Secretary of Transportation (Secretary) by the Department of Transportation Act, Pub. L. No. 89-670, § 5(e)(1)(E) and (F), 80 Stat. 939; see 49 U.S.C. 20701(2). The Secretary may impose civil penalties for violations of the LIA. 49 U.S.C. 21302(a) (2006 & Supp. III 2009). The LIA also provides, as a result of amendments made in 1988, see Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 14(7)(B), 102 Stat. 633, that "[a]n act by an individual that causes a railroad carrier to be in violation is a violation." 49 U.S.C. 21302(a)(1). Thus, a manufacturer violates the LIA if its products cause a railroad carrier to violate the LIA.[2]

c. Although regulation of railroads under the LIA and other early laws was extensive, it was not comprehensive, and Congress eventually deemed additional federal regulation necessary. In 1970, Congress enacted

---

or more control stands [*i.e.*, panels of controls used by an engineer to control the locomotive]." 49 C.F.R. 229.5. A "tender" is "[a] car attached to a locomotive, for carrying a supply of fuel and water." *Webster's New International Dictionary of the English Language* 2126 (1917).

[2] In a regulation adopted after the events at issue in this case, the Federal Railroad Administration made explicit that manufacturers of railroad parts are covered by the LIA. See 49 C.F.R. 229.7(b) (noting that "[a]ny person," including a "manufacturer * * * of railroad equipment, track, or facilities," who causes a violation of the LIA is subject to civil penalties), first promulgated at 53 Fed. Reg. 28,601 (1988).

the Federal Railroad Safety Act (FRSA), 49 U.S.C. 20102 *et seq.*, to "promote safety in every area of railroad operations and reduce railroad-related accidents." 49 U.S.C. 20101. The FRSA directs the Secretary, "as necessary," to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect" when the FRSA was enacted. 49 U.S.C. 20103(a). Under authority delegated by the Secretary, the Federal Railroad Administration (FRA) has promulgated extensive safety standards. See 49 C.F.R. Pts. 227, 229, 230, 232 and 238.

The FRA also regulates working conditions connected to railroad operations, pursuant to the LIA and other federal railroad statutes. The FRA does not, however, exercise statutory authority over working conditions in railroad maintenance facilities; in such facilities, railroads must comply with the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.* The OSH Act authorizes the Secretary of Labor to promulgate standards for safe and healthful employment and workplaces. 29 U.S.C. 652(8), 653(b)(1), 655. The OSH Act also specifies that it does not "enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law." 29 U.S.C. 653(b)(4).

d. Congress has also enacted laws to promote safety and provide remedies for railroad employees specifically. In 1908, Congress enacted the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, which provides a federal cause of action for injured railroad employees against their employers. Under FELA, a railroad employer is liable to its employees for injuries resulting from its negligence. 45 U.S.C. 51. If an employee is injured because his railroad employer has vio-

lated the LIA or another federal safety statute, the railroad's negligence is established as a matter of law under FELA, and the defenses of contributory negligence and assumption of risk do not apply. 45 U.S.C. 53, 54; *Urie* v. *Thompson*, 337 U.S. 163, 188-189 (1949).

2. Under the Supremacy Clause, state laws that "interfere with, or are contrary to," federal law are invalid and preempted. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). Federal law may preempt state law expressly, or preempt it implicitly when the state law conflicts with the federal law or when Congress intends the federal law to "occup[y] the field." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000). Under field preemption, state law is preempted "where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English* v. *General Elec. Co.*, 496 U.S. 72, 79 (1990). Field preemption may be found when a "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room * * * to supplement it," or when "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) (citation omitted). Finally, conflict preemption occurs "where compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or where "[state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

a. Although the LIA does not expressly address its effect on state laws, this Court long ago held that the

LIA "was intended to occupy the field" of "regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation." *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605, 607, 613 (1926). In *Napier*, railroads challenged Georgia and Wisconsin statutes that "prohibit[ed] use within the State of locomotives not equipped with" certain devices —in Georgia, an automatic door to the engine's firebox, and in Wisconsin, a curtain enclosing the engine cab. *Id.* at 607, 609-610. The ICC had not required railroads to install either device. *Id.* at 609.

This Court held in *Napier* that the LIA preempted these state laws because it "was intended to occupy the field" of "regulating locomotive equipment." 272 U.S. at 607, 613. The Court reasoned that "the power delegated to the Commission by the [LIA] [was] a general one" and "extend[ed] to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 611. The Commission's power, the Court explained, included the authority "not merely to inspect" but also "to prescribe the rules and regulations by which fitness for service shall be determined." *Id.* at 612; see *ibid.* (noting that "the Commission sets the standard" for whether a locomotive is "'in proper condition' for operation"). Thus, although the Commission had issued no specific regulations regarding firebox doors or cab curtains, "[t]he broad scope of [its] authority" precluded the state requirements. *Id.* at 613.

Although the LIA thus displaces any state-law standard of care governing the fitness for use of locomotives, tenders, and their parts and appurtenances, it does not displace any state-law cause of action for a party injured by a violation of the LIA. Rather, an injured party may bring a state common-law tort action (to the extent such

action is not precluded by some other federal law, such as FELA with respect to suits by railroad employees), and the substantive standard applied in such case is the safety standard the LIA prescribes. See *Tipton* v. *Atchison, Topeka & Santa Fe Ry.*, 298 U.S. 141, 150-151 (1936); see also *Moore* v. *Chesapeake & Ohio Ry.*, 291 U.S. 205, 215 (1934) (SAA); cf. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 249-256 (1984) (Congress's preemption of the field of nuclear safety concerns does not preclude state tort remedies for those injured by nuclear incidents).

b. The FRSA expressly addresses the preemptive effect of regulations issued under its provisions. After stating that "[l]aws, regulations, and orders related to railroad safety * * * shall be nationally uniform to the extent practicable," 49 U.S.C. 20106(a)(1) (Supp. III 2009), the FRSA provides:

> A State may adopt or continue in force a law, regulation, or order related to railroad safety * * * until the Secretary * * * prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety * * * when the law, regulation, or order—
>
> (A) is necessary to eliminate or reduce an essentially local safety * * * hazard;
>
> (B) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (C) does not unreasonably burden interstate commerce.

49 U.S.C. 20106(a)(2) (Supp. III 2009); see *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658 (1993) (discussing predecessor version of FRSA preemption provision that is substantantively the same as the current provision). Section 20106(b), enacted in 2007 as an amendment to Section 20106, clarifies that "[n]othing in this section shall be construed to preempt" actions under state law seeking damages based on a party's failure to comply with a federal standard of care established by a federal regulation; with a party's own plan, rule, or standard created pursuant to a federal regulation; or with a state law, regulation, or order permitted by Section 20106(a)(2). 49 U.S.C. 20106(b)(1) (Supp. III 2009).

3. a. From 1947 to 1974, George Corson worked as a welder and machinist repairing locomotives in railroad maintenance facilities. Pet. App. 23a n.1; J.A. 120. Much of his work required him to remove insulation from locomotive boilers and to replace brake shoes on locomotives. *Id.* at 3a. After he retired, Corson was diagnosed with malignant mesothelioma, the only known cause of which is exposure to asbestos. *Ibid.* Before his death in 2008, Corson and his wife filed suit in Pennsylvania state court against various entities, including respondents, seeking damages for injuries allegedly caused by Corson's exposure to asbestos contained in the insulation and brake shoes he handled, as well as in other locomotive parts with which he worked. *Id.* at 2a-3a, 23a. Petitioners are Corson's widow and the executor of his estate. *Id.* at 3a. Respondent Railroad Friction Products Corporation (RFPC) sold and distributed the brake pads that petitioners allege contained asbestos; respondent Viad Corporation is an alleged successor in interest to the company that manufactured other parts petitioners allege contained asbestos. *Ibid.* Viad

moved for summary judgment on the ground that the asserted claims were preempted by federal law, but the state court denied that motion. *Ibid.*

b. After the state court granted summary judgment in favor of most of the original defendants on non-preemption grounds, including a defendant whose presence in the case had defeated diversity jurisdiction, respondents removed the case to federal district court. Pet. App. 3a-4a. Respondents then filed motions seeking summary judgment on preemption grounds. *Id.* at 4a. The district court granted the motions, concluding that the LIA preempted petitioners' state-law claims for products liability and negligence. *Ibid.*; *id.* at 22a-39a. Relying on this Court's decision in *Napier*, the district court held that the LIA occupies the field of regulating locomotives and locomotive parts used in interstate commerce. *Id.* at 4a, 26a-29a. The court rejected petitioners' argument that the LIA preempts only state regulation of locomotives that are "in use," and therefore does not preempt claims involving the installation, repair, and removal of locomotive parts in a repair shop. *Id.* at 5a, 30a-31a.

c. The court of appeals affirmed. Pet. App. 6a-21a. The court concluded that this Court's decision in *Napier* dictated that "the LIA preempts a broad field relating to the health and safety of railroad workers, including requirements governing the design and construction of locomotives, as well as equipment selection and installation." *Id.* at 11a. The court reasoned that "Congress's goal of uniform railroad equipment regulation would clearly be impeded by state product liability suits against manufacturers, the purpose of which is, in part, to persuade defendants to comply with a standard of care established by the state." *Id.* at 14a. The court

agreed with petitioners that liability under the LIA "only exists if the locomotive was in use at the time of the accident," but concluded that that limitation "has no impact on the scope of preemption." *Id.* at 10a n.5.

SUMMARY OF ARGUMENT

The Locomotive Inspection Act imposes a uniform nationwide standard of care governing the safety of locomotives, tenders, and their parts and appurtenances for use on railroad lines. This Court held long ago that, in enacting the LIA, Congress intended to occupy the field of regulating the safety of locomotive equipment used on highways of interstate commerce, and that state regulation of that subject is therefore preempted. The LIA's substantive safety standard thus governs liability in any state common-law negligence action regarding whether a locomotive is safe to operate.

In determining that the LIA occupies the field of locomotive safety, this Court has made clear—as the statute itself makes clear—that the standard of care imposed by the LIA governs only locomotives that are in use. *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605, 607, 613 (1926). It does not apply to locomotives that are non-operational, such as locomotives undergoing repairs at a maintenance facility. The Secretary's authority to issue regulations pursuant to the LIA is similarly limited to the promulgation of regulations governing whether locomotives, tenders, and their parts and appurtenances are safe to operate. Because the scope of the regulation under the LIA is coextensive with the scope of the field preempted by the statute, the preempted field does not include claims related to whether a locomotive or locomotive part was safe to repair in a railroad maintenance shop. The court of ap-

peals therefore erred in concluding that petitioners' claims are within the field preempted by the LIA.

Some of petitioners' claims may nevertheless be preempted under principles of conflict preemption because they would stand as an obstacle to the LIA's objective of uniform nationwide standards governing the safety of locomotives for use. Petitioners allege that locomotive parts containing asbestos are unreasonably dangerous in all of their uses. Such a claim is likely to be preempted because it amounts to a claim that a locomotive containing such parts is not safe to operate, which could result in different States' imposition of different rules governing when a locomotive is safe to use. Such a claim would stand as an obstacle to achievement of the LIA's uniformity purpose. Petitioners also allege, however, that respondents were negligent in failing to warn the decedent about how to protect himself when working with asbestos-containing products in repair shops. Such a claim likely would not be preempted because it does not speak to the safety for use of locomotives, tenders, or their parts and appurtenances.

ARGUMENT

This Court held in *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605, 607, 613 (1926), that the LIA was "intended to occupy the field" of "regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation."[1] The text of the statute and this Court's early cases construing both the statute

---

[1] Although petitioners suggested in their petition for a writ of certiorari (Pet. 36-40) that this Court should overrule *Napier* and "abandon[] the doctrine of implied federal field preemption" more generally, they do not appear to renew that claim in their merits brief, see Pet. Br. 20-31.

and the federal government's authority to promulgate regulations to implement it make clear that the standard of care imposed by the LIA applies only to locomotives and tenders that are in use. Because the scope of the preempted field cannot be broader than the scope of the regulated field, see *United States* v. *Locke*, 529 U.S. 89, 111 (2000), claims concerning injuries sustained while a locomotive was not operative are outside the scope of the field preempted by the LIA. But claims that fall outside the preempted field might nevertheless be precluded under principles of conflict preemption if they stand as an obstacle to any purpose or objective of the LIA.

A. Petitioners' Claims Are Not Within The Field Preempted By The Locomotive Inspection Act

The court of appeals erred in holding (Pet. App. 12a-16a) that the field occupied by the LIA encompasses claims that do not concern whether a locomotive was safe to operate. The LIA regulates only the safe use on railroad lines of locomotives or tenders and their parts and appurtenances. The field the statute preempts is coextensive with the field the statute regulates. The preempted field thus does not include tort claims based on injuries arising while locomotives are not in use.

1. The LIA applies only to the use on railroad lines of a locomotive or tender and its parts and appurtenances

The LIA provides that "[a] railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances * * * are in proper condition and safe to operate without unnecessary danger of personal in-

jury." 49 U.S.C. 20701.[4] The text of the statute thus makes clear that its safety requirements apply only to the "use" of a locomotive or tender "on [a] railroad line." *Ibid.* The specified standard of care—that locomotives or tenders and their parts and appurtenances be "in proper condition and safe *to operate*"—similarly indicates that the LIA governs safety only during use or operation. *Ibid.* (emphasis added).

This Court has interpreted the reach of the statute, and the scope of the ICC's authority under the statute, in precisely this manner. In *Baltimore & Ohio Railroad* v. *Groeger*, the Court stated that the LIA "made unlawful" the "*use* of boilers unless safe *to operate* as specified." 266 U.S. 521, 529 (1925) (emphasis added); see *id.* at 527 (noting that carrier's "duty to have the boiler in a safe condition to operate so that it could be used without unnecessary peril to its employees was absolute and continuing" under LIA); *id.* at 529 (LIA requires that "boiler [be] in proper condition and safe to operate"). And in *Napier*, the Court stated that the ICC had authority "to prescribe the rules and regulations by which fitness *for service* shall be determined," and that those rules and regulations established whether a locomotive

---

[4] Corson's alleged injuries arose between 1947 and 1974, during which time the LIA's substantive provision stated: "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of [specified sections] and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." 45 U.S.C. 23 (1946).

was "'in proper condition' *for operation*." *Napier*, 272 U.S. at 612 (emphasis added); see *United States* v. *Baltimore & Ohio R.R.*, 293 U.S. 454, 462-463 (1935). The conclusion that the LIA applies only when a locomotive or tender is in use also accords with this Court's interpretation of the SAA, which similarly regulates the "use" of vehicles on "railroad lines," 49 U.S.C. 20302. See *Brady* v. *Terminal R.R.*, 303 U.S. 10, 13 (1938) (holding that the SAA applied because the railroad car that injured the plaintiff was "in use").[5]

The ICC's own interpretation of the LIA also confirms the in-use limitation on the scope of the LIA's substantive safety provisions. In response to a 1922 order from the Senate, the ICC filed a report stating that "it is the 'use' of a locomotive not found to be in proper condition and safe to operate, and not the condition itself, which is a violation of the law." ICC, *Inspection of Locomotive Boilers: Report of the Commission to the Senate*, 73 I.C.C. 761, 763 (Aug. 29, 1922). That interpretation by the agency authorized (at the time) to enforce

---

[5] The federal courts of appeals have also uniformly held, in FELA cases alleging negligence based on violations of the LIA, that "[w]hether the LIA applies turns on whether the locomotive was 'in use.'" *Wright* v. *Arkansas & Mo. R.R.*, 574 F.3d 612, 620 (8th Cir. 2009). Based on the "in use" limitation, the courts have consistently ruled that the LIA does not govern "injuries directly resulting from the inspection, repair, or servicing of railroad equipment located at a maintenance facility." *Angell* v. *Chesapeake & Ohio Ry.*, 618 F.2d 260, 262 (4th Cir. 1980); *e.g.*, *McGrath* v. *Consolidated Rail Corp.*, 136 F.3d 838, 842 (1st Cir. 1998); *Crockett* v. *Long Island R.R.*, 65 F.3d 274, 277 (2d Cir. 1995); *Steer* v. *Burlington N., Inc.*, 720 F.2d 975, 976-977 (8th Cir. 1983); *Estes* v. *Southern Pac. Transp. Co.*, 598 F.2d 1195, 1198-1199 (10th Cir. 1979); *Tisneros* v. *Chicago & N.W. Ry.*, 197 F.2d 466, 467-468 (7th Cir.), cert. denied, 344 U.S. 885 (1952). See also *Brady*, 303 U.S. at 13 (suggesting that a railroad car is not "in use" when it "has reached a place of repair").

the statute and to promulgate regulations implementing its mandate is entitled to deference. See *Illinois Cent. R.R.* v. *ICC*, 206 U.S. 441, 454 (1907) (noting that the "[C]ourt has ascribed to [decisions of the ICC] the strength due to the judgments of a tribunal appointed by law and informed by experience.").

2. The scope of the field the LIA preempts is coextensive with the scope of the field the LIA regulates

Because the LIA's standard of care does not govern liability for claims based on injuries arising from repairs to locomotives at maintenance facilities, those claims are not within the field preempted by the statute. See *Locke*, 529 U.S. at 111 (explaining that the scope of the field preempted by Title II of the Ports and Waterways Safety Act is coextensive with the scope of the activity regulated by that Title).

a. The decision in *Napier* supports that conclusion. The Court in *Napier* framed the question before it as "whether the [LIA] has occupied the field of regulating locomotive equipment *used* on a highway of interstate commerce, so as to preclude state legislation." 272 U.S. at 607 (emphasis added). The Court's holding that Congress intended the LIA to have such field-preemptive effect was based on "[t]he broad scope" of the ICC's regulatory authority under the statute. *Id.* at 613. The Court determined that the state requirements at issue—which regulated the design and features of in-use locomotives—fell within the preempted field because they were "within the scope of the authority delegated to the Commission," which was to set the standards governing when a locomotive is "fit[] *for service*" and "'in proper condition' *for operation*." *Id.* at 611-612 (emphasis added). Because Congress had vested in the ICC the "power to specify the sort of equipment to be *used* on

locomotives," *id.* at 612 (emphasis added), the state-law requirements at issue were within the preempted field.

Although respondents apparently agree that the LIA's duty of care covers only operational locomotives, tenders, and their parts and appurtenances, they have argued that the preempted field is broader because the regulatory authority granted to the Secretary (and originally to the ICC) is broader. See Viad Cert. Stage Supp. Br. 5-7; RFPC Cert. Stage Supp. Br. 3-5. But in so arguing, respondents misconstrue this Court's discussion in *Napier* of the ICC's—now the Secretary's—authority under the LIA, which is limited to prescribing rules governing the safety of locomotives for use and operation. See *Napier*, 272 U.S. at 612 (explaining that a locomotive engine was "not 'in proper condition' for operation" unless it complied with the rules promulgated by the ICC pursuant to the LIA). In particular, respondents rely on the statement in *Napier* that "the power delegated to the [ICC] by the [LIA] is a general one [that] extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 611. It is certainly true that the Secretary may prescribe safety rules governing "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances"; but such rules govern only whether the locomotive, tender, and parts and appurtenances, as designed and constructed, are safe to use or operate on a railroad line. See 49 U.S.C. 20701; *Napier*, 272 U.S. at 607, 612. And respondents are correct that any particular locomotive subject to the safety rules promulgated by the Secretary pursuant to the LIA will inevitably come in and out of use over time. But the substantive reach of the LIA, and of the Secretary's authority to promulgate

rules implementing it, extends only to whether a locomotive is "safe *to operate* without unnecessary danger of personal injury." 49 U.S.C. 20701 (emphasis added).[6]

b. The conclusion that the preempted field is coextensive with the regulated field also makes practical sense. Categorically preempting all state-law tort suits, even when the LIA does not govern the conduct giving rise to the injury, would leave several categories of injured persons without a remedy. Although the LIA preempts state substantive standards of care governing the use of locomotives, tenders, and their parts and appurtenances, see *Groeger*, 266 U.S. at 523, it does not preempt state common law causes of action for damages that are based on violations of the federal standard of care established by the LIA. The LIA—like the SAA—does not itself supply a cause of action. See *Urie* v. *Thompson*, 337 U.S. 163, 188 (1949); *Tipton* v. *Atchison, Topeka & Santa Fe Ry.*, 298 U.S. 141, 147-148, 150-151 (1936). Instead, States are "at liberty to afford any appropriate remedy for breach of the duty imposed" by the LIA, *id.* at 148, unless the state action is preempted by a differ-

---

[6] Respondent RFPC has supported its argument that the scope of the regulated field under the LIA extends beyond operational locomotives and tenders and their parts and appurtenances by noting (RFPC Cert. Stage Supp. Br. 6) that the Secretary has required warning labels on railroad equipment. But the regulations RFPC cites do not support its argument. Two of the regulations apply by their terms to locomotives that are being "operate[d]" or are "in service." 49 C.F.R. 210.27, 229.113. A third cited regulation applies to railroad freight cars, which are not locomotives, tenders, or their parts and appurtenances. 49 C.F.R. 215.9(a). And two of the four cited regulations were adopted pursuant to the Secretary's authority under both the LIA and the much broader FRSA. See 49 C.F.R. Pt. 229, p. 441 (2010).

ent federal law.[7] *E.g.*, *Crane* v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164 (1969) (state-law tort suit by non-railroad employee based on violation of duty imposed by SAA); *Fairport, Painesville & E. R.R.* v. *Meredith*, 292 U.S. 589 (1934) (same); *Herold* v. *Burlington N., Inc.*, 761 F.2d 1241, 1245-1247 (8th Cir.) (recognizing a state-law cause of action based on a violation of the LIA), cert. denied, 474 U.S. 888 (1985). It would therefore make little sense to preempt state-law causes of action that do not even involve the standard of care imposed by the LIA, and are for that reason outside the preempted field of substantive safety standards.

In the same vein, although FELA provides employees of railroad carriers with a cause of action against their employers for all negligence actions, regardless of whether the LIA applies, FELA does not provide a cause of action to independent contractors and employees of third parties. See *Kelley* v. *Southern Pac. Co.*, 419 U.S. 318, 323-324 (1974). Thus, an independent contractor or other non-railroad employee improperly exposed to asbestos dust in a locomotive maintenance workshop would be left without recourse for his injuries. He would have no claim under FELA because he is not a railroad employee. And, if respondents are correct, the independent contractor also would have no state-law tort claim against either the railroad or the manufacturer of the injurious products because those claims would be preempted by the LIA even though the LIA's substantive safety standards do not govern non-operational locomotives.

---

[7] For example, FELA provides a federal cause of action for railroad employees against their employers that displaces state-law causes of action for employment-related injuries. See *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 165 (2007).

In addition, FELA does not provide even railroad employees with a cause of action against manufacturers of locomotives and locomotive parts. See 45 U.S.C. 51. Thus, if a railroad employee was injured by a defectively manufactured part while repairing a locomotive, but the railroad carrier was not itself negligent, the employee would be left without a remedy.[8] Depriving an injured individual of a remedy for an injury that occurred outside the field in which the LIA preempts state substantive law may be justified if allowing the remedy would prevent the LIA from achieving its purposes (see pp. 22-29, *infra*), but it is not justified absent that kind of conflict.

The FRA's regulatory practice lends further support to the conclusion that the field preempted by the LIA does not reach state law governing claims for injuries occurring during repairs to non-operational locomotives. Although the LIA does not authorize the FRA to regulate hazards posed by the repair process, the FRA has broad authority to regulate those hazards under the

---

[8] Similarly, if the preempted field were as broad as respondents contend, railroads apparently would be deprived of a contribution remedy against manufacturers of locomotive parts if a railroad employer was found under FELA to be negligent in the injury of a repair shop employee and some or all of that negligence was attributable to a manufacturer. See *Engvall* v. *Soo Line R.R.*, 632 N.W. 2d 560, 569-571 (Minn. 2001) (holding that railroad has state-law cause of action for contribution against manufacturer based on violation of the LIA); see also *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 86-88 (1981) ("At common law there was no right to contribution among joint tortfeasors. In most American jurisdictions, however, that rule has been changed either by statute or by judicial decision. Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability.") (footnotes omitted).

FRSA. See 49 U.S.C. 20103(a) (authorizing the Secretary to regulate "every area of railroad safety"). The FRA has not, however, generally chosen to exercise its authority under the FRSA to regulate safety and health hazards at railroad maintenance facilities. Rather, the FRA has generally deferred to the Occupational Safety and Health Administration (OSHA), focusing its regulations instead on railroad operations—the movement of equipment over railroad lines. See 43 Fed. Reg. 10,583-10,590 (1978) (notice of termination of rulemaking and policy statement clarifying that FRA will continue to regulate working conditions closely associated with operational locomotives but will leave to OSHA the task of regulating working conditions in other areas of the railroad industry).[9] Thus, OSHA's rules governing workplace safety generally, rather than railroad-specific

[9] Petitioners argued below that the FRSA narrowed the scope of the field preempted by the LIA because it provides that a State "may adopt or continue in force a law, regulation, or order related to railroad safety" until the Secretary "prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. 20106(a)(2) (Supp. III 2009). The court of appeals correctly rejected that argument, Pet. App. 18a-20a, and petitioners do not renew it in this Court. The operative language of the FRSA expressly provides that it "supplement[s]" existing laws and regulations, instead of replacing or modifying them. 49 U.S.C. 20103(a). In addition, the FRSA's stated intent is that "[l]aws, regulations, and orders related to railroad safety * * * be nationally uniform to the extent practicable." 49 U.S.C. 20106(a)(1) (Supp. III 2009). Because the FRSA was expressly designed to maximize national uniformity in laws regulating railroad safety, it would make little sense to interpret the statute as authorizing States to enact differing, and potentially conflicting, safety regulations in areas previously governed by a uniform national standard. As the Ninth Circuit observed in an opinion authored by then-Judge Kennedy, "the language and structure of the [FRSA] indicate a congressional intent to leave the [LIA] intact, including its preemptive effect." *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1153 (1983).

rules of the FRA, govern working conditions in railroad repair shops.

B. Some Of Petitioners' Claims May Nevertheless Be Preempted To The Extent They Conflict With The LIA

The court of appeals expressed concern (Pet. App. 13a-14a) that permitting suits against manufacturers of locomotive parts for injuries sustained during locomotive repairs would undermine the LIA's goal of nationwide "uniform railroad equipment regulation." That is a legitimate concern, but it is best addressed through application of conflict-preemption principles rather than by artificially extending the scope of the field preempted by the LIA. See *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 510-522 (1989) (applying conflict-preemption principles after determining that state regulation in question was outside any field preempted by federal law). The court of appeals declined to consider whether conflict preemption would bar any of petitioners' claims. See Pet. App. 11a n.7. And because the district court granted summary judgment to respondents soon after the case was removed to federal court, petitioners' claims have not yet been developed beyond their articulation in petitioners' complaint. It may, therefore, be appropriate for this Court to remand the case to allow the district court or court of appeals an opportunity to apply principles of conflict preemption in the first instance. See *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 453 (2005) (remanding for determination of whether particular claims were preempted).[10]

---

[10] The question presented in the petition for a writ of certiorari is broad enough to encompass application of conflict-preemption principles to petitioners' claims. See Pet. i ("Did Congress intend the federal railroad safety acts to preempt state law-based tort lawsuits?").

As this Court has held, in an area in which "Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (citation omitted); see *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 31 (1996); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Thus, tort claims outside the preempted field are still preempted if they actually conflict with the LIA. See *Locke*, 529 U.S. at 111-112 (holding that conflict-preemption rules apply to state regulation of oil tankers if the regulations in question fall outside the field preempted by Title II of the Ports and Waterways Safety Act).

1. The LIA and other railroad safety laws do have the purpose of "promot[ing] the safety of employees and travelers upon railroads," 36 Stat. 913; see *Lilly* v. *Grand Trunk W. R.R.*, 317 U.S. 481, 486 (1943) (referring to LIA's "humanitarian purpose"). But Congress enacted those laws for the additional purpose of imposing uniform national standards on common carriers, thereby "prevent[ing] 'the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them.'" *Oglesby* v. *Delaware & Hudson Ry.*, 180 F.3d 458, 461 (2d Cir.) (quoting *Swift & Co.* v. *Wickham*, 230 F. Supp. 398, 408 (S.D.N.Y. 1964) (three-judge court) (Friendly, J.)), cert. denied, 528 U.S. 1004 (1999). See *United Transp. Union*, 455 U.S. at 688 (noting that Congress has determined that "a uniform regulatory scheme is necessary to the operation of the national rail sys-

tem"); 49 U.S.C. 20106(a)(1) (Supp. III 2009) ("Laws, regulations, and orders related to railroad safety * * * shall be nationally uniform to the extent practicable."); see also Pet. App. 12a-13a; *First Sec. Bank* v. *Union Pac. R.R.*, 152 F.3d 877, 880-881 (8th Cir. 1998); *Law* v. *General Motors Corp.*, 114 F.3d 908, 910-911 (9th Cir. 1997). Some state-law tort claims arising from injuries sustained while a locomotive is not in use would have the effect of prescribing rules about whether a locomotive is fit for use, resulting in different rules in different States regarding locomotives' fitness for service. Because such a result would undermine one of the important objectives of the LIA, those claims would conflict with the LIA and be preempted.

For example, just as a FELA plaintiff could not bring an LIA-based claim seeking to impose damages liability on an employer for failing to install the newest device or technology on its locomotive, a plaintiff could not bring a state-law tort claim that would call for the same result. As the Court explained in *Groeger*, the LIA requires that locomotives, tenders, and their parts and appurtenances be maintained in a condition that "would permit use of the locomotive without unnecessary danger." 266 U.S. at 530. The Court also made clear, however, that when the Secretary (or the ICC) has not required that a particular device or type of equipment be installed or used on a locomotive, the LIA "left to the carrier the choice of means to be employed to effect that result." *Id.* at 529-530. As the Court explained:

> It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders and appurtenances are to be kept in proper condition. Nor are such matters to be left to

> the varying and uncertain opinions and verdicts of juries.

Id. at 530-531. Thus, a tort action claiming that a particular device or piece of equipment must be used on a locomotive in order for the locomotive to be safe to operate would be conflict-preempted even if the claim arose from an injury sustained when the locomotive was not in use.

Applying that principle in this case, it appears that some of petitioners' claims would likely be preempted while others would not. For example, petitioners allege that locomotive parts containing asbestos are inherently defective because they are unreasonably dangerous however they are used. J.A. 27. Such a theory of liability would amount to a claim that the use of asbestos-containing products on locomotives would as a matter of law render such locomotives not "safe to operate without unnecessary danger of personal injury," 49 U.S.C. 20701(1), thereby permitting courts and juries to "restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders and appurtenances are to be kept in proper condition," *Groeger*, 266 U.S. at 530-531. Such a theory of liability would, therefore, be conflict-preempted even if it arose in a claim concerning an asbestos-related injury sustained while a locomotive was in a repair shop (and therefore not in use). That kind of claim would undermine the uniformity-of-regulation objective of the LIA because it could effectively prohibit locomotives traveling in the relevant State from including parts containing asbestos while other States might not impose a similar ban.[11]

---

[11] In 1996, after being directed by Congress to consider whether to regulate the use of asbestos-containing products on locomotives, the

Petitioners also allege, however, that Corson sustained his injuries because the respondents did not warn him and other repair-shop workers to take precautionary measures against exposure to asbestos while handling the brakes and insulation. J.A. 27. These claims are unlikely to be preempted because they would not require manufacturers of locomotives or railroads to alter the design or construction of their locomotives —and, therefore, would not conflict with the LIA.

Respondent Viad argues that allowing petitioners' failure-to-warn claims to go forward would permit States to "promulgate otherwise preempted safety regulations in the guise of instructional labels and then create causes of action for injured workers if railroads failed to post them." See Viad Cert. Stage Supp. Br. 9 (quoting *Ogelsby*, 180 F.3d at 461). That is incorrect. If a State promulgates a regulation that has the effect of governing whether a locomotive is safe to operate, the regulation would be preempted. But if a State requires manufacturers of locomotive parts to warn repair-shop employees about how to protect themselves from potential hazards from exposure to asbestos when the employees work with the parts while the locomotive is not in use, such a requirement would neither be within the field covered by the LIA nor conflict with the Act's pur-

---

FRA opted not to do so. The FRA concluded that newer locomotives no longer incorporate asbestos-containing products and that, although "older locomotives remaining in services may still contain limited amounts of asbestos, there is no evidence that the presence of asbestos poses a problem to humans or the environment." See FRA, *Locomotive Crashworthiness and Cab Working Conditions: Report to Congress* 10-12 (Sept. 1996). In other words, the FRA concluded that the continued use on older locomotives of products containing asbestos did not render such locomotives unfit for service.

poses and objectives—and would not, therefore, be pre-empted.

It is true, as respondent Viad points out (Viad Cert. Stage Supp. Br. 9), that different States might impose different warning requirements. But variance among required warning labels would not have the effect of imposing non-uniform standards about whether locomotives are safe to operate. Manufacturers and railroads may post warnings in repair shops themselves (which obviously do not move from State to State) or on the packaging for the materials in question. To the extent a particular part might need to be repaired "at any time" (*ibid.*)—and presumably in any place—manufacturers or railroads may either affix the most stringent form of warning required by any particular State or affix a label that incorporates requirements imposed by several States. Such requirements are a cost of doing interstate business in many industries and do not amount in this context to requirements governing the safe design and construction for use of locomotives, tenders, or their parts and appurtenances.

2. Petitioners further argue (Br. 28-30) that, even setting aside the in-use limitation on the field preempted by the LIA, their claims against manufacturers of locomotive parts (*i.e.*, respondents) would not fall within that field because manufacturers were not regulated under the LIA at the time Corson was exposed to products that allegedly contained asbestos.[12] Petitioners'

---

[12] As explained in petitioners' brief (Br. 29-30), the LIA did not apply to manufacturers until 1988, when the penalty provision was revised to apply to "[a]ny person (including a railroad and any manager, supervisor, official, or other employee or agent of a railroad) violating" the Act. Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 14(7)(A), 102 Stat. 633. As noted at n.2, *supra*, regulations promulgated in 1988

argument assumes that the relevant field is defined by the persons directly regulated rather than the subject matter—the safety for use of locomotives and tenders and their parts or appurtenances. Cf. *Napier*, 272 U.S. at 612 ("The federal and state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object."). There is no need to address that question here, however, for regardless of whether that contention is correct, petitioners' claims are preempted to the extent they actually conflict with a purpose or objective of the LIA. In *Engine Manufacturers Association* v. *South Coast Air Quality Management District*, 541 U.S. 246 (2004), this Court considered whether state air quality rules applicable to purchasers of motor vehicles were preempted by a provision in the Clean Air Act stating that "[n]o State or political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." *Id.* at 252 (quoting 42 U.S.C. 7543(a)). The Court rejected an argument that the state regulations at issue were not preempted because they were directed at purchasers of cars rather than the manufacturers of

---

to enforce the LIA defined "[a]ny person" to include a "manufacturer * * * of railroad equipment, track, or facilities." 53 Fed. Reg. at 28,601. In 1992, the Act's penalty provision was again amended to explicitly include manufacturers within the persons to whom the LIA's substantive safety provisions apply. Rail Safety Enforcement and Review Act, Pub. L. No. 102-365, § 9(a)(8), 106 Stat. 978. In 1994, the LIA was repealed as part of a comprehensive re-codification of the statutes governing railroad transportation, see Act of July 5, 1994, § 7(b), 108 Stat. 1380, and the reenacted provisions do not include the LIA's penalty provision. The LIA does continue to provide that "[a]n act by an individual that causes a railroad carrier to be in violation is a violation." 49 U.S.C. 21302(a)(1).

cars, which were the subject of direct regulation under the Clean Air Act. The Court reasoned that "treating sales restrictions and purchase restrictions differently for pre-emption purposes would make no sense. The manufacturer's right to sell federally approved vehicles is meaningless in the absence of a purchaser's right to buy them." *Id.* at 255.

Just as a car manufacturer's right to sell a car that meets certain specifications would be meaningless if no one were permitted to purchase such a car, a railroad's ability to operate a locomotive that meets certain specifications would be meaningless if no one were permitted to manufacture the parts of such a locomotive. Thus, regardless of whether petitioners' state-law tort claims against respondent manufacturers could fall within the field preempted by the LIA, they may be preempted under principles of conflict preemption.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT S. RIVKIN
General Counsel

PAUL M. GEIER
Assistant General Counsel for Litigation

PETER J. PLOCKI
Deputy Assistant General Counsel for Litigation
Department of Transportation

KAREN J. HEDLUND
Chief Counsel

MICHAEL T. HALEY
Deputy Chief Counsel

STEPHEN N. GORDON
Trial Attorney
Federal Railroad Administration

DONALD B. VERRILLI, JR.
Solicitor General

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

SARAH E. HARRINGTON
Assistant to the Solicitor General

DOUGLAS N. LETTER
ABBY C. WRIGHT
Attorneys

AUGUST 2011

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-879

Supreme Court, U.S.
FILED
AUG 19 2011
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, WIDOW IN HER OWN RIGHT,
Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR AMICUS CURIAE ACADEMY OF RAIL LABOR ATTORNEYS *IN SUPPORT OF PETITIONERS*

JOHN D. ROVEN
Counsel of Record
HECTOR L. SANDOVAL
ROVEN-KAPLAN, L.L.P.
2190 N. Loop West, Ste 410
Houston, Texas 77018
Counsel for Amicus Curiae
(iroven@rovenlaw.com)

August 19, 2011

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES IV

INTEREST OF AMICUS CURIAE 1

STATEMENT X1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. CONGRESS NEVER INTENDED TO FORECLOSE STATE TORT REMEDIES FOR LOCOMOTIVE-BASED INJURIES 3

A. The Safety Appliance Act "Sprang from the Principle of the Common Law" 3

B. After FELA, Tort Remedies for Off Line Locomotive Injuries Were Reserved to the States 6

C. LIA Excluded Locomotive Manufacturers and Locomotive Mechanics From Coverage 10

1. Sellers of Locomotives Were Intentionally Excluded From LIA 10

2. Railroad Mechanics Were Excluded From LIA's Coverage 13

3. The "In Use" Requirement Pervades Railroad Safety Regulation 16

II. LIA "LEFT TO THE CARRIERS" FREEDOM TO INNOVATE 19

III. THE ABSENCE OF A FEDERAL REGULATION GOVERNING, REQUIRING OR BANNING A LOCOMOTIVE PART DOES NOT EXTINGUISH STATE TORT REMEDIES FOR PERSONS ACTUALLY INJURED BY THAT PART 25

A. *Groeger* Established the Parameters of an LIA Claim in 1925 25

B. The *Napier* Decision Did Not Alter *Groeger's* Application 27

C. The Post *Napier* Decisions of this Court Defined the Limits Of *Napier's* "Field" 30

D. State Law Provides the Remedy for Those Injured on Locomotives Not "In Use" Under LIA 32

IV. "SWEEPING PREEMPTION" DISPLACES TRADITIONAL REMEDIES AND LEAVES MANY INJURED BY LOCOMOTIVE EQUIPMENT WITH NO REMEDY 35

A. "Take Home" Exposure Cases 36

B. Plant Railroad Injuries 37

C. Employees Of Bankrupt Railroads . 39

V. CONCLUSION 40

TABLE OF AUTHORITIES

CASES PAGE

Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett, 300 U.S. 471 (1937) 31, 32, 33, 35

Atchison, Topeka & Santa Fe Ry. Co. v. Saxon, 284 U.S. 458 (1932) 9

Baltimore & Ohio Ry. Co. v. Groeger, 266 U.S. 521 (1925) 20, 26

Boley v. Goodyear Tire and Rubber, 929 N.E.2d. 448 (Ohio, 2010) 37

Brady v. Terminal Railroad Assn., 303 U.S. 10 (1938) 5, 6, 15

Chicago, B.&Q. Ry Co. v. United States, 220 U.S. 559 (1911) 17, 18

Chicago & Eastern Illinois Railroad Co. v. Industrial Commission of Illinois, 284 U.S. 296 (1931) 8

Conrail v. Ray, 632 F. 3d 1279 (D.C. Cir. 2011) 39

Consolidated Rail v. Erie Lackawanna, Inc., 481 U.S. 1070 (1987) 39

Crane v. Cedar Rapids & I. C. Ry. Co., 395 U.S. 164 (1969) 30, 31

CSX Transp. Inc. v. Williams, 608 S.E.2d. 208 (Ga. 2005) 36

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) 29

Edwards v. Pacific Fruit Express Co., 390 U.S. 538 (1968) 11, 37

Employers' Liability Act Cases: Howard v. Illinois Central Railroad Co., et al, 207 U.S. 463 (1908) 6, 7, 10

Engvall v. Soo Line Railroad Co., 632 N.W. 2d. 560 (Minn. 2001) 27, 36

Forrester v. American Diesel Electric, Inc., 255 F.3d. 1205 (9th Cir. 2001) 38

Freightliner Corp. V. Myrick, 514 U.S. 208 (1995) 25

Galveston H. & S.A. Ry. Co. v. Perez, 182 S.W. 419 (Tex. App. 1916) 33

Gilvary v. Cuyahoga Valley Ry. Co., 292 U.S. 57 (1934) 30, 33

Great Northern Ry. Co. v. Donaldson, 246 U.S. 121 (1918) 20

Herold v. Burlington Northern, Inc. 761 F. 2d. 1241 (8th Cir. 1985) 27

Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) 19

Holmes v. Pneumo Abex, L.L.C., 2011 Ill. App. LEXIS 653 (Ill.App. 4th Dist. 2011) 37

Illinois Central Railroad Co. v. Behrens, 233 U.S. 473 (1914) 8

Industrial Accident Commission of the State California, et al v. Davis, 259 U.S.182 (1922) 8

In Re: West Virginia Asbestos Litigation, 592 S.E.2d. 818 (W.Va.App. 2003) 38

In Re: Erie Lackawanna Inc.; Erie Lackawanna Ry. Co. v. Henning, et. al., 803 F.2d. 881 (6th Cir. 1986) 39

Johnson v. Southern Pacific Co., 196 U.S. 1 (1904) 18

Kernan v. American Dredging Co. 355 U.S. 426 (1958) 15

Kurns v. A.W. Chesterton, Inc., 620 F. 3d. 392 (2010) 27

La Casse v. New Orleans T. & M.R. Co., 64 So. 1012 (La. 1914) 12, 33

Lee v. Central Georgia Ry. Co., 252 U.S. 109 (1920) 36

Lorencie v. SEPTA, 34 F. Supp. 2d. 929 (E.D. Pa. 1998) 12

Lyle v. Atchinson Topeka & Santa Fe Ry. Co., 177 F.2d 221 (7th Cir. 1949) 15

Mahutga v. Minneapolis, St. Paul & S.S.M Ry. Co., 234 N.W. 474 (Minn. 1931) 26, 27

Marshall v. Burlington Northern, Inc., 720 F.2d. 1149 (9th Cir. 1983) 27

McGraw v. Galveston H. & S.A. Ry. Co. (182 S.W. 417) 33

Moore v. Chesapeake and Ohio Ry. Co., 291 U.S. 205 (1934) 5, 30

Napier v. Atlantic Coast Line R. Co. et al, 272 U.S. 605 (1926) 2, 3, 4, 17, 27, 29, 32

New York Central Railroad Co. v. Winfield, 244 U.S. 147 (1917) 8, 9, 28

New York, New Haven & Hartford Railroad. Co. v. New York, 165 U.S. 628 (1897) 4

NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937) 8

Norfolk and Western Railway v. Ayers, 538 U.S. 135 (2003) 19, 36

Pacific Gas & Electric Co., et al. v. State Energy Resources Conservation and Development Commission, et al., 461 U.S. 190 (1983) 11, 28

Painesville & Eastern R. v. Meredith, 292 U.S. 589 (1934) 30

Patton v. Baltimore & Ohio R. Co., 197 F.2d. 732 (3rd Cir., 1952) 34

Penna & N.Y. Canal & R.R. Co. v. Mason, et al; 109 Pa. 296 (Pa. 1885) 12

Perez v. Southern Pacific, 883 P.2d 424, (Az. App. 2nd 1993) 37

Philadelphia & Reading Railway Co. v. Polk, 256 U.S. 332 (1921) 9

Railroad Commission of Wisconsin v. Aberdeen & Rockfish Railroad Co., et al 142 I.C.C. 199 (1928) 21

Regional Rail Reorganization Cases, 419 U.S. 102 (1974) 39

Richmond & Danville Railroad Co. v. Elliott, 149 U.S. 266 (1893) 4

Risberg v. Duluth M. & I.R. Ry. Co., 47 N.W.2d. 113 (Minn. 1951) 35

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 38

Satterlee v. St. Louis-San Francisco Ry. Co., 82 S.W.2d. 69 (Mo. 1935) 26

Scarlett v. AT&SF Ry. Co., 60 P.2d. 462 (Cal. 1936) 31

Schlemmer v. Buffalo R. & P. Ry. Co., 205 U.S. 1 (1907) 5

Second Employers' Liability Act Cases: Mondou v. New York, New Haven & Hartford Railroad Co., 223 U.S. 1 (1912) 7

Shanks v. Delaware, Lackawana & Western Railroad Co. 239 U.S. 556 (1916) 8

Shields v. Atlantic Coast Line R. Co., 350 U.S. 318 (1956) 21

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 28

Southern Railway Co. v. Lunsford, 297 U.S. 398 (1936) 21, 22

Southern Railway Co. v. OSHA, 539 F.2d. 335 (4th Cir. 1976) 18

Southern Railway Co. v. United States, 222 U.S. 20 (1911) 4

Southern Pacific Transportation Co. v. Usery, et al., 539 F.2d. 386 (5th Cir. 1976) 18

St. Clair, Madison; St. Louis Belt Ry. Co. v. Henckell, 12 Ill. App. 54 (Ill. App. 4th Dist. 1906) 12

Texas & Pacific Railway Co. v. Rigsby, 241 U.S. 33 (1916) 5

Tipton v. Atchison, Topeka & Santa Fe Ry. Co., 298 U.S. 141 (1936) 5, 30

United States v. Northern Pacific Railway Co., 254 U.S. 251 (1920) 15, 35

United States v. Baltimore & Ohio Railroad Co., et al., 293 U.S. 454 (1935) 21, 24

United States v. Long Island Railroad Co., 4 F.2d. 750 (E.D. N.Y. 1925) 17

United States v. AT&SF Railway, 163 F. 517 (8th Cir. 1908) 18

Urie v. Thompson, 337 U.S. 163 (1949) 15, 28, 29, 32, 35, 36

Wabash Railroad Co. v. Hayes, 234 U.S. 86 (1914) 9

Walton v. Southern Pacific Co., 48 P.2d. 108 (Cal.App. 1st) (1935) 30

Widera v. Ettco Wire and Cable Corp., 204 A.D. 2d. 306 (N.Y. A.D. 2 Dept. 1994) 37

Wingo v. Celotex, et al., 834 F.2d. 375 (4th Cir. 1987) 33, 34

Wyeth v. Levine, 129 S.Ct. 1187 (2009) 19

STATUTES

29 U.S.C. §§651-678 17

45 U.S.C. §5 20

45 U.S.C. §6 4

45 U.S.C. §8 5

45 U.S.C. §22 ..... 13, 14, 28

45 U.S.C. §23 14

45 U.S.C. §34 12

45 U.S.C. §38 19

45 U.S.C. §54 15

49 U.S.C. §20505 19

49 U.S.C. §20701 ..... 12, 16

49 U.S.C. §20902 19

49 U.S.C. §21302 ..... 4, 11, 12

Act of 1903, ch. 976, 32 Stat. 943 4

Act of 1906, ch. 3073, §1, 34 Stat. 232 6

Act of 1908, ch. 149, 35 Stat. 65 7

Act of 1911, ch. 103, §§1-2, 36 Stat. 913 . 13, 14, 20

Act of 1915, ch. 169, §1, 38 Stat. 1192 14

Act of 1924. ch. 355, §1, 43 Stat. 659 14

Ky. Employers Liability Act; Carroll's Ky. Statutes, 1930 §§ 820 b-1, 820 b-2, 820 b-3 30

LEGISLATIVE MATERIALS

H.R. 9786, 61st Cong. (1909) 13

H.R. Comm. on Interstate and Foreign Commerce, Hearings on Bills Affecting Interstate Commerce, 61st Cong. 316-319 (Jan. 29, 1910) 11

S. 6702, 61st Cong. (1910) 13

S. 236, 61st Cong. (1909) 10, 13

S. Rep. No. 91-619 (1969) 16

S. Rep. No. 889 (1910) 10

S. Rep. No. 1974 (1911) 13

ADMINISTRATIVE MATERIALS

40th Annual Report of the Interstate Commerce Commission. 12/1/26. Table II, p. 73. Gov. Printing Office. 26

43 Fed. Reg. 50 (March 19, 1978) 17, 18

49 C.F.R. 91.1 (6/1/38) 20, 22

49 C.F.R. §229.1, et seq 25

49 C.F.R. 209, App. A at 40-41 (1999) 38

Inspection of Locomotive Boilers: *Report of the Commission to the Senate,* 73 I.C.C 761 (1922) 17

Railroad Commission of Wisconsin v. Aberdeen & Rockfish Railroad Co., et al, 142 I.C.C. 199 (May 5, 1928) 21

OTHER MATERIALS

40th "Annual Car & Locomotive Repair Directory" Railway Age, July, 2011: G1-G31 25

David W. Louisell and Kenneth M. Anderson: The *Safety Appliance Act and the FELA*: A Plea for Clarification, Vol. 18, Law and Contemp. Probs., 281, 255-86 (1953). 34

Lester P. Shoene & Frank Watson, *Workman's Compensation on Interstate Railways,* XLVII Harv. L.Rev. 389, 398 (1934) 9, 10

Johns-Manville Corp. N.Y. ,Johns-Manville Service to Railroads, pg. 4. (1922) 23

Locomotive Cyclopedia of American Practice, Eleventh Ed. 1941 ..... 21, 22, 23

Mancuso: Mesothelioma Among Railroad Workers in the United States; Vol. 643, Annals of the New York Academy of Sciences. 333-335 (1991) 23, 24

Samual Matthews Vauclain,, *Steaming Up!: The Autobiography of Samuel Vauclain*, Intro., pg. 7(Brewer Warren, N.Y. 1930) 11

The 50 Largest Transportation Companies. FORTUNE June 1967; 222 39

INTEREST OF AMICUS CURIAE[1]

The Academy of Rail Labor Attorneys ("ARLA") is a national organization of trial and labor lawyers specializing in FELA and related railroad litigation. Members represent both union and non-union rail employees and contractors, whose remedies if injured on the job, often include those under the Federal Employers' Liability Act in addition to those available under the parameters of state tort law. ARLA's genesis occurred, in substantial part, from our members representation and advocacy of locomotive mechanics, such as Petitioners' decedent, a retired Machinist.

ARLA is uniquely qualified to speak to the question presented in this case. Our members have represented and litigated the majority of the steam era occupational disease claims that manifested long after exposure occurred. We continue to do so today; one hundred years after the passage of the Locomotive Inspection Act.

STATEMENT OF THE CASE

ARLA adopts the statement of the Petitioners.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus represents that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than amicus, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3 (a), counsel for the amicus represents that all parties have consented to the filing of this brief. Letters reflecting their consent are on file with the Clerk.

SUMMARY OF THE ARGUMENT

In *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), this Court found state legislation of locomotive parts "used on a highway of interstate commerce" preempted for infringing on the regulatory field occupied by the Locomotive Inspection Act (LIA). The Court below found Petitioners' state remedies for mesothelioma, caused by contact with asbestos in a locomotive repair facility, prohibited by *Napier*. ARLA contends that this result was error, for three reasons:

First; when LIA was enacted and *Napier* written, remedies for such injuries had been reserved to the States; and in passing LIA Congress intentionally excluded manufacturers from federal regulation. This included Respondent Viad's predecessor Baldwin, who appeared before Congress in 1910. Railroad repairmen, who worked to maintain safe locomotives for the benefit of those who operated them "on the railroad's line", were granted no right of action under LIA. Thus, Petitioner's state law claims cannot infringe upon, or otherwise impact, a federal act that governed neither the rights of Petitioner's decedent, nor the conduct of Respondents.

Second; LIA provided the railroad industry with freedom to innovate. Asbestos was neither required nor banned on locomotives. Before *Napier*, this Court ruled that lawsuits for actual locomotive defects are valid, whether addressed by an agency regulation or not; while lawsuits asserting the need for extra or additional locomotive equipment are forbidden. This

principle was affirmed, not displaced, by *Napier*.

Third; the post *Napier* decisions of this Court have upheld the States' continuing role to provide remedies when FELA doesn't govern the rights of the parties. In such cases, when LIA by definition applies (ie; with an "on the line" injury) then LIA provides the standard of care and state law provides the cause of action. Where LIA is inapplicable (i.e. in an "off the line" injury) state law provides both the cause of action and the standard of care.

In Part IV, ARLA spotlights the consequences of the decision below. Total "sweeping" preemption of state law would eradicate many state causes of action of last recourse, leaving the injured who continue to depend on them without any remedy.

ARGUMENT

I. CONGRESS NEVER INTENDED TO FORECLOSE STATE TORT REMEDIES FOR LOCOMOTIVE-BASED INJURIES

A. The Safety Appliance Act "Sprang from the Principle of the Common Law".

The Locomotive Inspection Act of 1911 was not written on a blank slate. Understanding Congress' intent in passing it requires a step back to 1893 when LIA's "sister statute", the Safety Appliance Act ("SAA") became law.

SAA was Congress' first foray into a decentralized industry, enacted when the states oversaw all rail equipment within their borders. *See,*

e.g., *New York, New Haven & Hartford Railroad. Co. v. New York*, 165 U.S. 628 (1897) (upholding state regulation of passenger car heating against Commerce Clause challenge). Consistent with the high duty of common carriers, railroads were held to the standard of ordinary and reasonable care in the operation and maintenance of their equipment. *See, e.g.*, *Richmond & Danville Railroad Co. v. Elliott*, 149 U.S. 266, 271 (1893). (boiler explosion case).

Enacted primarily to mandate use of automatic couplers to protect switchmen working between cars, the act focused on requiring certain safety appliances and was narrowly drawn for that purpose. *See Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 608 (1926). In addition to automatic couplers, requirements included grab irons, ladders and walkways on any car "moving in interstate commerce".[2] The 1903 Amendment extended coverage to all locomotives and cars "whether the particular cars at the time were employed in such commerce or not". *Southern Railway Co. v. United States*, 222 U.S. 20, 27 (1911).

The Interstate Commerce Commission was authorized to levy penalties against railroads "hauling or permitting to be hauled or *used* on its line, any car found in violation" of the act or its regulations (former 45 U.S.C. §6).[3] Though SAA is

---

[2] Act of 1903, ch. 976, 32 Stat. 943.

[3] SAA's penalty provision along with much of SAA, was repealed when the Transportation Code was re-codified in title 49 in 1994. The FRA now possesses general authority to levy fines under 49 U.S.C. §21302.

narrow in scope, it is broadly applied; every locomotive and car remains subject to its requirement.

Aside from its regulatory function, SAA established a national standard of care applicable in all tort actions. "[E]ven without FELA [this] has never been doubted." *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 33, 39-40 (1916). Yet, like LIA to follow, SAA created no federal cause of action for its violation. *Moore v. Chesapeake and Ohio Ry. Co.*, 291 U.S. 205 (1934). In non-FELA cases, state law defines all claims and defenses "because the right to recover damages sprang from the principle of the common law and was left to be enforced accordingly" *Tipton v. Atchison, Topeka & Santa Fe Ry. Co.*, 298 U.S. 141, 150-151 (1936) (citations omitted). SAA modified the common law "in only one aspect, by withdrawing the defense of assumption of risk". *Id.* at 146.[4] That modification was held binding on the states in SAA injury cases even prior to FELA. *Schlemmer v. Buffalo R. & P. Ry. Co.*, 205 U.S. 1 (1907).

After FELA, state law claims for relief were routinely plead in the alternative; the frequent interchange of cars between railroads often placed liability for statutory violations on a non-employer railroad; against whom the plaintiff possessed no FELA rights. *See, e.g., Brady v. Terminal Railroad Assn.*, 303 U.S. 10 (1938).

SAA was designed to function in tandem with

---

[4] Former 45 U.S.C. §8 prohibits the defense in any case brought by a railroad employee

state law, not to displace it. As the first safety statute, SAA endures, but its modest scope reflects the limited federal ambition it serves.

B. After FELA, Tort Remedies for Off Line Locomotive Injuries Were Reserved to the States.

The SAA, having predated FELA by a decade, was clearly within contemplation of the Congress that passed FELA. *Brady*, 303 U.S. 10, 12 (1938). In 1906, Congress enacted the *first* Federal Employers' Liability Act, governing the liabilities of "*every common carrier engaged in trade or commerce*... for all damages which may result from the negligence of its officers, agents or employees". Act of 1906, ch. 3073, §1, 34 Stat. 232.

This Act was held unconstitutional in *Employers' Liability Act Cases: Howard v. Illinois Central Railroad Co., et al*, 207 U.S. 463 (1908); as exceeding the commerce clause power by regulating "without qualification or restriction... the business in which the railroads or their employees might be engaged at the time of injury. *Id.*, 207 U.S. 498.

> ...[T]ake a railroad engaged in interstate commerce, having a purely local branch operated wholly within a State. *Take again the same road having shops for repairs and it may be for construction work*...as the Act thus includes many subjects *wholly beyond the power to regulate commerce* and

> depends for its sanction upon that authority, it results that the act is repugnant to the Constitution. (*Id.*, emphasis added).

Rejecting the argument that "one who is engaged in interstate commerce thereby submits all his business concerns to the regulatory powers of Congress," the Court found that such contention... "would destroy the authority of the States... which, from the beginning have been and must continue to be under their control, so long as the Constitution endures".

Congress re-enacted FELA in the next session, but limited it to injuries occurring in interstate commerce: ...every common carrier *by railroad while engaging in interstate commerce...* shall be liable in damages to any person suffering injury *"while he is employed by such carrier in interstate commerce"*. Act of 1908, ch. 149, 35 Stat. 65. (emphasis added).

Second FELA survived challenge in Second *Employers' Liability Act Cases*: *Mondou v. New York, New Haven & Hartford Railroad Co.*, 223 U.S. 1 (1912). Justice Van Devanter (author of *Employers' Liability Act Cases) found* none of the infirmities that had plagued its predecessor "because unlike (first FELA) it deals only with the liability of a carrier...for injuries sustained by its employees while engaged in interstate commerce". *Id.*, 223 U.S. 51-52. As to the injuries within its coverage, FELA displaced state law because "now that Congress has acted, the laws of the States, *in so far as they cover the same field*, are superceded". *Id.*, at 55. (emphasis

added).

The scope of FELA's coverage proved to be a persistent subject on the Court's docket until 1939 when Congress erased the "intrastate-interstate" distinction. Until then, FELA was available only to employees actually connected with the movement of goods over rails.[5] *Illinois Central Railroad Co. v. Behrens*, 233 U.S. 473, 478 (1914) ("it is clear that Congress intended to confine its action to injuries...in which the employee is engaged is a part of interstate commerce").[6]

A "test" announced in *Shanks v. Delaware, Lackawana & Western Railroad Co.* 239 U.S. 556 (1916), narrowed the inquiry "...[I]s the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically part of it?" *Id.*, at 558. This essentially disqualified locomotive repairmen from FELA coverage. *Id.*, at 559-560. *See Industrial Accident Commission of the State California, et al v. Davis*, 259 U.S.182 (1922) (repairman injured while "drilling and tapping a boiler" not under FELA). *See also, Chicago & Eastern Illinois Railroad Co. v. Industrial Commission of Illinois*, 284 U.S. 296

---

[5] In 1939 hearings, Congress discussed the Court's treatment of *Employer's Liability Act Cases* in *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937) as providing impetus for Congressional action to amend the act.

[6] When FELA was passed in 1908 Congress, there were no State Workman's Compensation laws yet in place. Congress therefore, knew that "uncovered" employees would file common law actions for redress of "intrastate" injuries. *See New York Central Railroad Co. v. Winfield*, 244 U.S. 147, 165 (1917).

(1931) (injury on machine loading coal onto locomotive was not under FELA). *See also, Philadelphia & Reading Railway Co. v. Polk*, 256 U.S. 332, 334 (1921) (burden of proof to establish FELA coverage is on worker asserting it).

Prior to 1916, over 200 cases were appealed on FELA's intrastate-interstate distinction. From 1917 to 1933, forty-three Supreme Court opinions were devoted to the subject.[7] State law and FELA remedies were deemed mutually exclusive in *Wabash Railroad Co. v. Hayes*, 234 U.S. 86 (1914) and in *New York Central Railroad Co. v. Winfield*, 244 U.S. 147 (1917) negligence was deemed an essential element of proof in FELA. Injuries coming under FELA, but not caused by railroad negligence, were not eligible for state remedies. This generated more litigation as railroads began asserting FELA as the exclusive remedy, when to their advantage. "(This) case is one of a peculiar class where we have frequently been obliged to give special consideration to the facts to protect interstate carriers against unwarranted judgments...". *Atchison, Topeka & Santa Fe Ry. Co. v. Saxon*, 284 U.S. 458, 459 (1932).

In *Southern Railway*, this Court upheld Congress' power to regulate objects of commerce (i.e.,trains) operating wholly within the borders of a state, yet issues of liability and compensation occurring within those borders remained subject to state control, beyond federal intervention. The right of a state to

---

[7] Lester P. Shoene & Frank Watson, *Workman's Compensation on Interstate Railways*, XLVII Harv. L.Rev. 389, 398 (1934).

redress "intrastate" injuries was therefore considered sacrosanct "so long as the Constitution endures".[8] *Employers' Liability Act Cases*, 207 U.S. at 503. With this dual standard firmly in place, Congress enacted LIA.

C. LIA Excluded Locomotive Manufacturers and Locomotive Mechanics From Coverage.

1. Sellers of Locomotives Were Intentionally Excluded From LIA.

Within two years of FELA's passage, another measure "for the protection of employees", a Boiler Inspection Bill, was introduced in the Sixty-first Congress.[9] Responding to public outcry over boiler explosions, the Bill proposed penalties for both noncompliant "common carriers" and "sellers" of locomotive boilers. Viad's predecessor, the Baldwin Locomotive Works, then the world's largest

---

[8] The analytical divide between the two decisions was discussed extensively. "While the SAA is clearly distinguishable in legal theory (from FELA) a layman would find it difficult to understand why one injured as the result of a defective breakbeam could constitutionally recover under federal law while one injured by reason of some other defect in the car could not, in the absence of the interstate commerce element. Lester P. Shoene & Frank Watson, *Workman's Compensation on Interstate Railways*, XLVII Harv. L.Rev. 398, 411 (1934).

[9] Senate Bill 236 was originally filed as an amendment to the Safety Appliance Act. *See* S. Rep. No. 889 (1910); 61st Congress, 2nd Session.

locomotive builder,[10] sent a product designer to testify before the House. After assuring the Committee that the builder used only the finest materials in construction, he asserted that "the proposed bill in some respects falls so far short of the present practice that if it were made law, it might encourage lax methods".[11]

When passed, the penalty provision covered only "common carriers"; meaning "railroads", to the exclusion of others.[12] *Edwards v. Pacific Fruit Express Co.* 390 U.S. 538, 540 (1968). Congress therefore considered but excluded "sellers" from LIA; and while this Court is reluctant to draw inferences from congressional failure to act, it has refused to read into an act that which Congress has considered and discarded. *Pacific Gas & Electric Co. v. State Energy Resources Conserv. & Develop.*, 461 U.S. 190, 220 (1983).

The exclusion of "sellers" from LIA's ambit spotlights the question of whether manufacturers, unregulated by a federal act, should receive

---

[10] Samual Matthews Vauclain,, *Steaming Up!: The Autobiography of Samuel Vauclain*, Intro., pg. 7(Brewer Warren, N.Y. 1930). Vauclain was an official of Baldwin from 1883 until 1929 and retired as President.

[11] H.R. Comm. on Interstate and Foreign Commerce, Hearings on Bills Affecting Interstate Commerce, 61st Cong. 316-319 (Jan. 29, 1910). Testimony of William J. Austin, representing the Baldwin Locomotive Works.

[12] Former 45 U.S.C. §34, now subsumed in 49 U.S.C. §21302. P.L. 103-272 §1(e), 108 Stat. 892, as amended July 5, 1994. *See* fn. 3.

immunity that regulated entities do not enjoy. Since the 1800s, railroads have litigated state law damage suits for locomotive defects.[13]

Before 1992, when LIA's penalty provision was amended to capture non-railroads, the Interstate Commerce Commission (ICC) and the Federal Railroad Administration (FRA) possessed no power to penalize "sellers" of locomotives,[14] and LIA's current jurisdictional statute (49 U.S.C. § 20701) continues to cover only railroad carriers. In short, "nothing about the structure of the LIA indicates that in passing it, Congress intended to bring railroad manufacturers within its regulatory net". *Lorencie v. SEPTA*, 34 F. Supp. 2d. 929, 933-934 (E.D. Pa. 1998).

---

[13] Examples of pre-LIA boiler defect cases against railroads include *St. Clair, Madison; St. Louis Belt Ry. Co. v. Henckell*, 12 Ill. App. 54 (Ill. App. 4th Dist. 1906); (scalding case) and *Penna & N.Y. Canal & R.R. Co. v. Mason, et al;* 109 Pa. 296 (Pa. 1885); (exploding locomotive claim brought under state law by two employees). Post LIA boiler defect cases include *La Casse v. New Orleans T. & M.R. Co.* 64 So. 1012 (La. 1914) (employee injured in explosion, but not in interstate commerce, brought state law claim)

[14] 49 U.S.C. §21302 (now part of the Federal Rail Safety Act) formerly 45 U.S.C. § 34, as amended Sept. 3, 1997, Pub L- 102-365, 106 Stat 972, by ("Rail Safety Enforcement and Review Act") applied the provision to "owners, manufactures, lessors, and lessees of railroad equipment and facilities". This amendment was short-lived. It was never re-enacted after revision and re-codification of the 1994 transportation code. *Brief for Petitioners*, pg. 30.

2. Railroad Mechanics Were Excluded From LIA's Coverage.

Two competing theories of LIA regulation were debated by Congress. The first involved direct government inspection by up to 300 federal boiler inspectors. This would have "presumably relieved the carrier for liability from faulty inspection".[15] The second allowed railroads to privately inspect and report their findings to ICC. The first theory was abandoned before House-Senate reconciliation.[16]

As enacted, LIA adopted the "inspect, repair and report" approach. The Act regulated steam locomotives "moving in interstate or foreign traffic" and defined "employees" to include only "persons actually engaged in or connected with the movement of a train". Act of 1911, ch. 103, §§1-2, 36 Stat. 913. (former 45 U.S.C. §22). LIA's jurisdictional provision provided:

> "[I]t shall be unlawful for any common carrier, its officers or agents, subject to this Act to *use any locomotive engine*

---

[15] S. 236 was introduced on 3/22/09. A House Bill was introduced on 5/17/09. H.R. 9786, with others to follow. After extensive hearings, scientific submissions and amendments, the Mann revisions to the Senate Bill were substantially adopted by amendment in the Senate under S. 6702. S. Rep. No. 1974, 61st Congress, 3rd Sess., pg. 3 (1911); Report of Committee, and Foreign Commerce: "*History of the Proposed Legislation*".

[16] *Id.* Statement of Mr. Mann, Chairman of the House Committee on Interstate and Foreign Commerce, p. 46.

> propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this Act."[17]

A 1915 amendment extended LIA to "all of the parts and appurtenances" of the locomotive.[18] A 1924 Amendment altered the interstate commerce requirement, aligning it with SAA; all operating locomotives, even those functioning wholly within a state, would thereafter be covered.[19] The jurisdictional "in use" requirement was not, and has never been, amended. Mechanical employees whose injuries were not covered under FELA by the *Shanks* doctrine, were also intentionally placed outside the remedies LIA provides for "on the line" injuries.

Notwithstanding FELA's 1939 amendments, LIA's exclusion of locomotive mechanics remains.

---

[17] Act of 1911, ch. 103, §2, 36 Stat. 913. Former 45 U.S.C. §23

[18] Act of 1915, ch. 169, §1, 38 Stat. 1192. Former 45 U.S.C. §23.

[19] Act of 1924. Ch. 355, §1, 43 Stat. 659. Former 45 U.S.C. §22.

Only those injured when a locomotive is "in use on the line" may claim a statutory violation. *See, e.g., Brady*, 303 U.S. 10, 13 (1938). To apply LIA otherwise would extend the legislation "beyond the articulated intent of Congress". *Lyle v. Atchinson Topeka & Santa Fe Ry. Co.*, 177 F.2d 221, 222-23 (7th Cir. 1949). The requirement is not satisfied by the mere movement of a locomotive or its placement outside the repair facility. Instead, a locomotive must function in a train to come under LIA. *United States v. Northern Pacific Railway Co.*, 254 U.S. 251, 254 (1920). Locomotives switching or reassembling cars in rail yards are not "in use on the line" of a railroad. *Id.*

LIA and FELA are read *in pari materia*. *Urie v. Thompson*, 337 U.S. 163, 189 (1940). The safety statutes (LIA/SAA) are substantially, if not in form, amendments to the [FELA] (*Id.*); and "cannot be regarded as statutes wholly separate and independent of [FELA]". *Id.*, at 189.[20] Prior to *Kernan v. American Dredging Co.* 355 U.S. 426 (1958), they were the only statutes recognized as "enacted for the safety of employees," under FELA's §3.[21]

LIA was Congress' last significant railroad safety enactment until the Federal Rail Safety Act of 1970

---

[20] This Court has always treated the safety statues as intimately connected by history, construction and as reciprocally authoritative. *See, e.g, Kernan*, 355 U.S. 426 (1957); *Harlan J., dissenting* at 443, 444; 1915

[21] FELA's §3 (now 45 U.S.C. §54) relieves employees of comparative fault in the event of statutory violations.

(FRSA)[22] ; which was designed to "promote safety in every area of railroad operations". While drafting FRSA, Congress recognized that LIA/SAA were neither comprehensive nor applicable to the broad field of railroad safety.[23]

During the period of Mr. Corson's exposure, LIA excluded his mechanical work from its protection, and respondents from its penalties.[24] No precedent exists for a manufacturer, unregulated by a federal act, to enjoy immunity from the state tort claims of plaintiffs who possess no federal right of action under that act.

3. The "In Use" Requirement Pervades Railroad Safety Regulation.

In 1922, ICC responded to a Senate request for an update on LIA's effectiveness and commented on the nature of the act: "it is the *use of a locomotive* not found to be in proper condition and safe to operate, and *not the condition itself*, which is a violation of the

---

[22] 49 U.S.C. §20701, et. seq.

[23] S. Rep. No. 91-619, 91st Cong., 1st Sess. pg. 29 (1969). Appendix A: Report of the Task Force on Railroad Safety to the Secretary of Transportation. LIA/SAA recognized as limited acts meeting "only certain types of hazards"

[24] Beginning in 1947 until 1974, Mr. Corson was employed as a machinist repairing and maintaining locomotives in railroad maintenance facilities. JA42.

law". 73 I.C.C. 761, 763 (1922).[25] Indeed, civil penalties may be levied only for each non-compliant "use" of a locomotive. *United States v. Long Island Railroad Co.*, 4 F.2d. 750 (E.D. N.Y. 1925). Similarly, with SAA, "if the railroad does in fact *use cars* which do not comply...it violates the plain prohibition of the law". *Chicago, B.&Q. Ry. Co. v. United States*, 220 U.S. 559, 575 (1911). The ICC's fundamental grant of authority under LIA was to "prescribe the rules and regulations by which *fitness for service* should be determined". *Napier*, 272 U.S. 605, 612 (1926) (emphasis added).

After passage of the OSHA law in 1970,[26] FRA acknowledged its lack of expertise in locomotive repair facilities, and ceded that jurisdiction.

> If FRA were to address all occupational safety and health issues which arise in the *railroad yards, shops* and associated offices, the agency would be forced to develop a staff and field capability which would, to an extent, already duplicate the capability already possessed by OSHA...FRA recognizes that OSHA is not currently precluded from exercising jurisdiction with respect to conditions not rooted in *railroad operations*....43 Fed. Reg. 50 (March 19,

---

[25] Inspection of Locomotive Boilers: *Report of the Commission to the Senate in Response to Senate Resolution No. 327*, August 3, (calendar day August 7) 1922.

[26] 29 U.S.C. §§ 651-678

1978), (emphasis added).

See also, Southern Railway Co. v. OSHA, 539 F.2d. 335, 338, (4th Cir. 1976).(FRA does not "purport to regulate the occupational health and safety aspects of railroad offices or shop or repair facilities"); and *Southern Pacific Transportation Co. v. Usery, et al.,* 539 F.2d. 386 (5th Cir. 1976). (same).

Respondents insist that "in use" speaks only to the railroads' duty of care, while the act's preemptive effect emanates instead from the FRA's "exclusive power to regulate". RFPC, Supp. Brief in opposition to certiorari, p.8. However; this Court has ruled that the same facts that support a civil penalty will also support a violation in a personal injury case. *See Chicago, B.&Q. Ry. Co.*, 220 U.S. 559, 576-77, citing with approval *United States v. Atchison, Topeka & Santa Fe Ry. Co.*, 163 F. 517 (8th Cir. 1908) (Van Devanter, J.). The government agrees that LIA's "in use" requirement applies equally in a private tort case or a civil enforcement action. Brief for U.S., pg. 15.[27] This is because both types of proceedings are of a civil nature; in actions to recover penalties the government need only establish its case by a preponderance of the evidence. *Johnson v. Southern Pacific Co.*, 196 U.S. 1 (1904).

"In use" permeates the FRA's regulatory view. Agency authority to investigate accidents applies to those occurring "on the railroad line of a railroad

---

[27] The United States filed its brief supporting certiorari in *Crane v. Atwell*, No. 10-272 (Filed May 2011)

carrier". 49 U.S.C. §20902".[28] The government's position is clearly correct, and an agency's interpretation of its own functions is entitled to weight. *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718 (1985). This is particularly so when it is coherent and consistent. *Wyeth v. Levine*, 129 S.Ct. 1187, 1201 (2009).

In sum, LIA was designed to expand the protection of train crews and the liability of railroads who violate the act. It would make little sense to construe LIA as Congress' chosen means of extinguishing the liability of unregulated manufacturers, or to read into LIA an intention to deprive railroads of their state law contribution or indemnity rights against third parties who share responsibility for injuries. *See, e.g., Norfolk and Western Railway v. Ayers*, 538 U.S. 135 (2003).

II. LIA "LEFT TO THE CARRIERS" THE FREEDOM TO INNOVATE.

In the Spring of 1911, with railroads submitting LIA inspection plans, ICC enacted a short set of rules, the first one stating: "The railroad company will be held responsible for the general design and construction of the locomotive boilers under its

---

[28] Former 45 U.S.C. §38. The statute also permits investigations of malfunctions and accidents caused by defective signal systems which are, obviously "on the line" of a railroad. 49 U.S.C. §20505.

control".[29] This provision carried out Congress' intention; *i.e.*, that "the carriers were left free to determine how their boilers should be kept in proper condition for use without unnecessary danger." *Baltimore & O. Railroad Co. v. Groeger*, 266 U.S. 521, 529 (1925). With freedom, however, came responsibility for equipment choice.

In its first look at LIA, the Court upheld a plaintiff verdict in a boiler explosion death case. *Great Northern Ry. Co. v. Donaldson*, 246 U.S. 121 (1918). The railroad argued on appeal for exoneration as a matter of law because the boiler in question had "passed inspection". The Court disagreed: "we find nothing (in LIA) to warrant the conclusion that there is no liability for an unsafe locomotive because some particular feature of construction...(was not) disapproved by the federal boiler inspector." *Id.* at 128.

Donaldson's rationale dovetailed with LIA's concept of carrier self-inspection and freedom of equipment choice, within the bounds of the act. Under §5, railroads filed their own rules subject to "such modification as the Commission requires (becoming) obligatory upon such carrier." Act of 1911, Ch. 103, 36 Stat. 913; former 45 U.S.C. §5.

Substantive rule making under §6, mandating or requiring specific features, would require more. To mandate equipment, the ICC would have to render

---

[29] Rule 1: Rules and Instructions for Inspection and Tests of Locomotive Boilers and their Appurtenances. Interstate Commerce Commission Bureau of Locomotive Inspector, June 2, 1911. Codified in the first printing of C.F.R at 49 C.F.R. 91.1 (6/1/38)

quasi-jurisdictional findings consistent with the Act's §2 command. (i.e. that such was needed to prevent "unnecessary peril to life and limb") per LIA §2. *United States v. Baltimore & O. Railroad Co., et al.*, 293 U.S. 454 (1935). Agency fact finding and judicial review became the norm.[30]

The railroad supply industry flourished. Vendors advertised new products in the annual Locomotive Cyclopedia.[31] In addition to a variety of locomotive styles, thousands of component and replacement parts were offered with new inventions spawning a burgeoning marketplace of equipment. This innovation, no doubt, was aided by the Court's decision in *Southern Railway Co. v. Lunsford*, which held that "experimental devices" which "(did) not increase the peril" and were not "integral or

---

[30] Following the *Napier* decision, ICC decided *Railroad Commission of Wisconsin v. Aberdeen & Rockfish Railroad Co., et al*, 142 I.C.C. 199 (1928). Amendments to BIA Rule 116 permitted, *inter alia*, allowance of locomotive window coverings, to be regarded as "minimum requirements". *Id.*, at 210.

[31] *See, e.g.*, Locomotive Cyclopedia of American Practice, Eleventh Ed. 1941. Edited for the Association of American Railroads-Mech. Division by Simmons-Boardman Publishing Co. N.Y. The "Forward" contains an "historical" stating that the Cyclopedia traced its roots to the "Railroad Gazette" of the early century, but was reformatted in 1922 to provide "editorial and manufacturers data (being) grouped in major sections, these sections to be subdivided into chapters treating the various phases of locomotive construction and repair". p.5. The companion Cyclopedia for railcars was The Car Builders Cyclopedia. It was relied on extensively by the Court in *Shields v. Atlantic Coast Line R. Co.*, 350 U.S. 318, 321 (1956).

essential" parts of "completed locomotives" would not be considered "parts or appurtenances" to support a statutory violation. 297 U.S. 398, 401-402 (1936). To find otherwise, the Court said, "would hinder commendable efforts to better conditions".[32]

ICC Rules 15 and 16 required that inspection of the boilers' exterior was required whenever the "jacket and lagging" were removed every 5 years.[33] "Lagging" was "a covering laid on the outside of the boiler and cylinder to protect (against) loss of heat...usually composed of magnesia and asbestos and applied in sections made to fit the curvature of the boiler...wood formerly was used."[34]

---

[32] The device in *Lunsford* was known as "Wright's Little Watchmen"; an after-market option which would set air brakes in the rear of the train if the locomotive derailed. It was not alleged to have caused the derailment. 297 U.S. at 400.

[33] *See* fn. 29, supra. Original codification of Rules 15 and 16 are in 49 C.F.R. 91.1 (First Edition, 6/1/38)

[34] Locomotive Cyclopedia of American Practice. Eleventh Ed., supra, p. 56. "Dictionary of Locomotive Terms", "lagging".

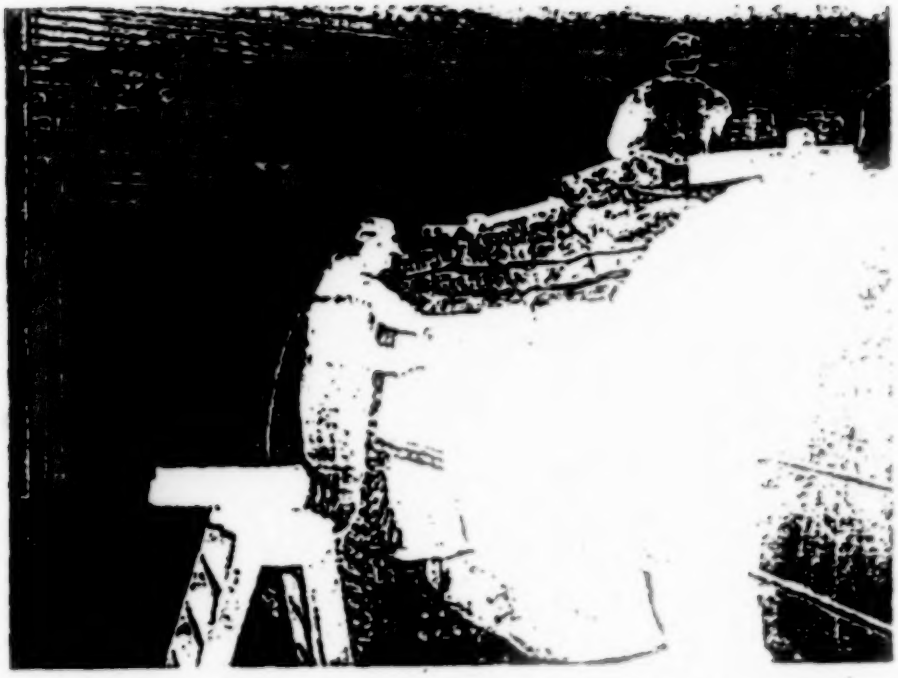


FIGURE 2. Installation of asbestos lagging to steam locomotive.[35]

Fiberglass,[36] aluminum foil insulation,[37] and asbestos containing insulations[38] were available.

---

[35] T.F. Mancuso, Mesothelioma Among Railroad Workers in the United States; Vol. 643, *Annals of the N.Y. Academy of Sciences*. 333, 335 (1991). Petitioner's decedent testified regarding the dusty conditions that were created as he and other craftsmen removed asbestos insulation from the boiler during disassembly and repair of locomotives. JA56-59, 60-70

[36] See fn. 34, p. 383. Advertisement for Gustin Bacon. Fiberglass Locomotive Lagging and Pipe Covering.

[37] See fn. 34, p. 504. Advertisement for Alcoa "Aluminum Jacket & Insulation" sold to Pennsylvania Railroad.

[38] Johns-Manville Corp. N.Y. , "Johns-Manville Service to Railroads", pg. 4. Description of Johns-Manville magnesia "Locomotive Boiler and Air Pump Lagging" with photo of installation methods, 1922.

No regulatory compulsion to use or not use asbestos in locomotives applied because no particular form of insulation was ever required or prohibited by the government. For such an unlikely mandate to have issued, ICC would have had to marshal the expertise regarding asbestos hazards sufficient to permit agency findings that could have withstood judicial review. *United States v. Baltimore & O. Railroad Co., et al.*, 293 U.S. 454 (1935)

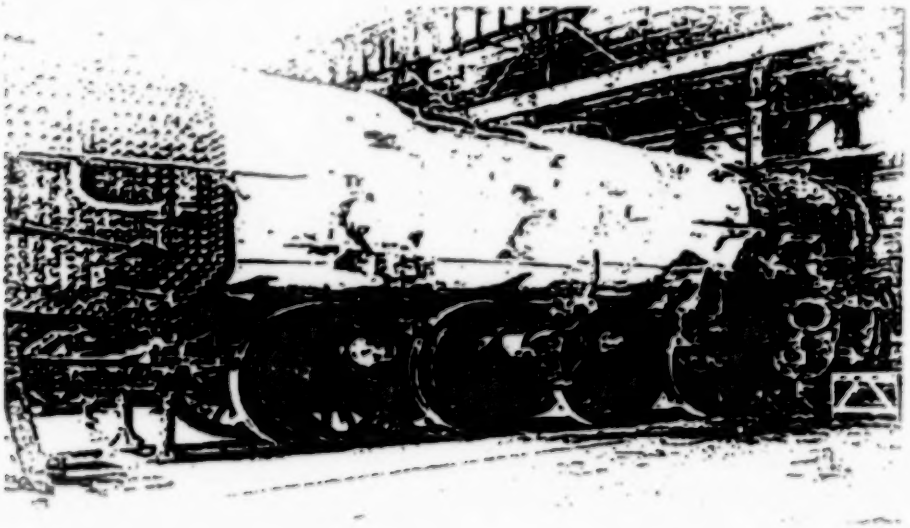


Figure 3. Asbestos lagging applied to locomotive.[39]

In 1996, FRA reported that "the two primary locomotive manufacturers stopped using asbestos in the 1970's"...and have policy statements now prohibiting it in locomotive construction.[40] The industry's decision to stop using asbestos was self imposed; no doubt a response to societal demands.

---

[39] See fn. 35, pg. 336.

[40] See Brief for Petitioners; pg. 10; fn. 12.

But it was not based on any standard or mandate; and as this Court has stated "[The absence of a federal standard cannot impliedly extinguish state law. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995).

A thriving market in locomotive construction and repair continues today. The locomotive safety standards[41] encourage innovation. This accounts for the proliferation of contract repair shops, locomotive rebuilders, and parts suppliers now advertising in the July, 2011 40th Annual Car and Locomotive Repair Directory.[42]

III. THE ABSENCE OF A FEDERAL REGULATION REQUIRING OR BANNING A LOCOMOTIVE PART DOES NOT EXTINGUISH STATE TORT REMEDIES FOR PERSONS ACTUALLY INJURED BY THAT PART.

A. *Groeger* Established the Parameters of an LIA Claim in 1925.

With industry freedom of choice came questions of responsibility. From 1923-25, over 3000 serious accidents from locomotive part failures were reported

---

[41] 49 C.F.R. §229.1, et seq.

[42] 40th Annual Car & Locomotive Repair Directory". Railway Age, July, 2011: Supplement; G1-G31.

by the ICC.[43] In *Groeger*, this Court considered a boiler explosion case in which the trial court's instructions tracked the plaintiffs theory; i.e. that the lack of a safety feature, (one not required by ICC), could support a finding of liability. 266 U.S. 521, 529(1925).[44] This Court reversed..."[I]t is not for Courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their boilers are kept...(because) inventions are occurring frequently *and there are many devices to accomplish the same purpose*". *Id.*, at 530. On remand, the jury could consider the merits of the feature but only "in determining the essential and ultimate question; i.e. whether the boiler was in the condition required by the Act". *Id.*, at 531.

Groeger's paradigm has governed for nearly a century. The desirability of "extra" or additional locomotive devices, not specified by ICC/FRA, is not a matter "to be left to the varying and uncertain opinions of juries"; but injuries caused by actual defects will support actions alleging a violation. *Id.*, at 531. In other words, "if the (agency)...has specified what is a 'proper construction and safe to operate', then neither a court nor jury can say otherwise". *Satterlee v. St. Louis-San Francisco Ry. Co.*, 82 S.W.2d. 69 (Mo. 1935) (citing *Mahutga v. Minneapolis, St. Paul & S.S.M Ry. Co.*, 234 N.W.

---

[43] 40th Annual Report of the Interstate Commerce Commission. 12/1/26. Table II, p. 73. Gov. Printing Office.

[44] The plaintiff blamed the absence of "fusible plugs"; pop valves which functioned as a warning device against excessive boiler pressure. *Groeger*, 266 U.S. at 522.

474, 476 (Minn. 1931), *and see Marshall v. Burlington Northern, Inc.*, 720 F.2d. 1149 (9th Cir. 1983) (motorist alleged need for brighter headlight than required by LIA regulations; claim preempted)[45]. However, once a part is chosen and actually installed, its defect constitutes a violation. *See, e.g., Herold v. Burlington Northern, Inc.* 761 F.2d. 1241 (8th Cir. 1985)(rotating beacon not required by FRA, but actually installed by railroad), (distinguishing *Marshall*, supra); and, *Engvall v. Soo Line Railroad Co.*, 632 N.W.2d. 560 (Minn. 2001) (*Groeger's* paradigm permits state law indemnity claim against locomotive builder for defective part installed but not covered by FRA rule).

B. The *Napier* Decision Did Not Alter *Groeger's* Application.

Based on a broad reading of *Napier*, 272 U.S. 605 (1926), the court below found that LIA preempts all state remedies for locomotive-based injures. Equating Mr. Corson's mesothelioma case with the state legislation forbidden in *Napier*, the Third Circuit found that LIA preempts a "broad field relating to the health and safety of railroad workers including requirements governing the design and construction of locomotives". *Kurns v. A.W. Chesterton, Inc.*, 620 F.3d. 392, 397 (3rd Cir. 2010).

---

[45] *See* Brief for Petitioners, pg. 50, cases cited; These "additional requirement vs. actual defects" cases form a continuing doctrine in LIA litigation.

This is off the mark because "[LIA/SAA] cannot be regarded as statutes wholly separate from and independent of the (FELA)". *Urie*, 337 U.S. 163 at 189 (1949). When *Napier* was written, locomotive mechanical injuries were not covered by FELA , no less LIA which had defined "employee" to exclude repair shop workers (former 45 U.S.C. §22).

Equating a state law injury claim with a state "legislative requirement" is a step this Court has been slow to take absent a compelling reason. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (state tort claim for radiation poisoning not preempted although the subject of nuclear safety has been previously found subject to federal regime).[46] Remedies are not *per se* "regulations"; the fact that federal law governs many aspects of motor vehicle design, without more, does not prohibit states from providing remedies in vehicular collision cases. Dissenting from *Winfield*, nine years earlier, Justice Brandeis agreed:

> "The subject of compensation for accidents is one peculiarly appropriate for state legislation...the field of compensation injuries appears to be one in which uniformity is not desirable, or at least not essential to the public welfare". *Winfield*, 244 U.S. at 169 (1917). Brandeis, J. dissent.

---

[46] *Pacific Gas & Electric Co., et al. v. State Energy Resources Conservation and Development Commission, et al.* 461 U.S. 190 (1983)

Petitioner's state law injury claims are not LIA "requirements" in any event. LIA is a remedial statute having the purpose and effect of "facilitating employee recovery, not of restricting such recovery or making it impossible". *Urie*, 337 U.S. at 189:

> ...(LIA/SAA) would take on highly incongruous character if, at the very time they were expediting employee recovery under the Employer's Liability Act by substituting the comparatively light burden of proving violation of their prohibitions for the heavier one of proving negligence, they were also contracting the scope of compensable injuries and to that extent defeating recovery altogether. *Urie*, 337 U.S. at 190.

History, congressional intent and regulatory context compel the conclusion that the issue resolved in *Napier* was precisely defined by that Court: "*it is whether the (LIA)* has occupied the field of *regulating* locomotive equipment used on a highway of interstate commerce, *so as to preclude state legislation*". 272 U.S. at 611. The circuit court erred in over reading *Napier*, and by then applying its erroneous interpretation to negate the presumption against preemption that always applies in rail safety cases. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

C. The Post *Napier* Decisions of this Court Defined the Limits of *Napier's* "Field".

In *Moore*, 291 U.S. 205 (1934) the Court upheld a Kentucky tort statute[47] paralleling "with almost literal exactness the provisions of [FELA]". 291 U.S. at 212. Finding the state statute *in pari materia* with FELA/SAA, there was "no anomaly in enforcing the state law with this defined content". *Id.*, at 213. In *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57 (1934), the court rejected a preemption claim, by upholding a pre-employment agreement requiring the employee to seek his intrastate safety statute remedies through workman's compensation. "(The acts) do not create, prescribe, measure or govern the enforcement of, the liability arising from the breach. *They do not extend to the field occupied by the state compensation act*". 292 U.S. at 61-62. *See also, Painesville & Eastern R. v. Meredith*, 292 U.S. 589, 598 (1934) (LIA/SAA standard of care extended to motorists injuries, with the "validity of (such) cause of action left to state law"); and *Tipton*, 298 U.S. 141, 151 (1936) (state may compel workman's compensation in lieu of state common law SAA action); *citing with approval; Walton v. Southern Pacific Co.*, 48 P.2d. 108 (Cal. App. 1st) (1935) "correctly holding that the same principles apply in an action under the (LIA)"; and, *Crane v. Cedar*

---

[47] Ky. Employers Liability Act; Carroll's Ky. Statutes, 1930 §§ 820 b-1, 820 b-2, 820 b-3.

Rapids & I. C. Ry. Co., 395 U.S. 164, 166-167(1969), reaffirming this line of cases.

The Court's *Moore-Crane* decisions demonstrate that *Napier's* "preemptive field" never reached state tort remedies at all; certainly not those alleging LIA/SAA violations.[48] Could state tort remedies for locomotive defects which are not LIA violations be preempted under *Napier*?

Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett, 300 U.S. 471 (1937) provides clarity. In *Scarlett*, this Court reversed the California Supreme Court's affirmance of a ruling allowing an SAA violation to go to the jury. *See Scarlett v. Atchison, Topeka & Santa Fe Ry. Co.*, 60 P.2d. 462 (Cal. 1936). Plaintiff fell while descending a ladder which was an SAA appliance; yet his injury was actually caused by slipping from a "brace rod" which was not an SAA appliance. The ladder was not alleged defective.[49] This Court, citing *Napier*, reversed: "the railway... having strictly complied with the (ladder) regulation has discharged its full duty so far as (SAA) is concerned." *Scarlett*, 300 U.S. at 473:

---

[48] In state court, Mr. Corson's LIA violation claims were dismissed because such claims were not permitted "while in the [repair] shops. Brief for Petitioners, pg. 12. The Circuit Court later ruled that the *Moore-Crane* line of cases had "no impact" because the plaintiffs "are not asserting liability under BIA" *Id., at pg. 14.*

[49] Although this Court's opinion does not specifically identify the case as an "intrastate" injury case, it had to have been. The court below stated that plaintiff had waived his claim of "common law negligence" *Scarlett*, 60 P.2d. at 467.

> "The right of recovery, if any, must therefore rest upon the effect of the near proximity of the ladder to the rod, neither being in itself defective. *The law to be applied to that situation is the common law rule of negligence and not the inflexible rule of the (SAA).* (emphasis added) *Id.*, at 475.

Had *the Scarlett* plaintiff been injured by asbestos on a "not in use" locomotive, the remedy would remain "the common law rule of negligence". In harmony with the principles of *Groeger*, the *Scarlett* Court relied on *Napier* to strike the SAA claim as one calling for "additional requirements", yet upheld the common law as the proper vehicle for recovery in such cases. *Id.*

D. State Law Provides the Remedy for Those Injured on Locomotives Not "In Use" Under LIA.

SAA's coverage is "specific" while LIA's coverage is of the entire locomotive. *Napier*, 272 U.S. at 611. This distinction does not diminish the teaching or applicability of *Scarlett* now. An LIA violation may be based on a defect and injury not contemplated by a specific agency rule. *Urie*, 337 U.S. at 189 (1940)(inhalation of silica particles). Thus, the only locomotive injuries which cannot state an LIA violation, are those occurring on locomotives not "in use".

State law remedies for non-FELA causes of action, including the Kentucky statute approved in *Moore*, are inherently "not repugnant" to the LIA/SAA. *Gilvary*, 292 U.S. at 62. Indeed the state law negligence relief approved in *Scarlett* did not offend *Napier* even though a jury would have been required to evaluate "the near proximity of the ladder to the rod" (the ladder being an SAA device) under common law principles. *Scarlett*, 300 U.S. 474-475.

In fact, state tort claims for "not in use" locomotive defects have always existed. The San Antonio roundhouse explosion of 1912 was an early example.[50] One year after LIA's passage, a locomotive being pressure tested in a Texas roundhouse exploded causing massive destruction.

Two reported cases involved a landowner and pedestrian who were grievously injured, both were tried under state law. *Galveston H. & S.A. Ry. Co. v. Perez*, 182 S.W. 419 (Tex. App. 1916) (verdict affirmed for pedestrian under doctrine of *res ipsa loquitor*), *McGraw v. Galveston H. & S.A. Ry. Co.* (182 S.W. 417) (Tex.App., 1916) (fall injuries tried under state law negligence). *See also, La Casse v. New Orleans T. & M.R. Co.*, 64 So. 1012 (La. 1914) (boiler explosion for "not in use" locomotive tried under state negligence theory), and *Wingo v. Celotex*,

---

[50] On March 18, 1912, one year after LIA's passage the worst boiler explosion in U.S. history occurred. A steam locomotive in San Antonio exploded, killing 26 with 50 more injured and 10 unaccounted for. *Explosion in San Antonio, Texas March 18, 1913*, State Library and Archives Commission, *available at*: http://www.tsl.state.tx.us/exhibits/railroad/fight/explosion.html.

et al 834 F.2d. 375 (4th Cir. 1987) (state law indemnity action by railroad after FELA verdict for Machinist exposed to asbestos).

Similarly, cases are brought under state law alleging defects that *would have* constituted SAA violations but for inability to meet the "in use" requirement. This includes a Third Circuit decision, *Patton v. Baltimore & Ohio R. Co.*, 197 F.2d. 732 (3rd Cir., 1952) never discussed by the *Kurns* court.[51] In *Patton*, a non-FELA plant worker was killed by a runaway car with an SAA defect. The plaintiff could not demonstrate that the car was "in use" on the

---

[51] *Patton* was discussed extensively in *David W. Louisell and Kenneth M. Anderson*: The *Safety Appliance Act and the FELA:* A Plea for Clarification, Vol. 18, Law and Contemp. Probs., 281, 255-86 (1953).

railroads line at the time of injury. *Id.*, at 741. The proper remedy, as in *Scarlett*, was found to be "that of negligence actionable at common law". *Id.*, at 741-742. *See also, Risberg v. Duluth M. & I.R. Ry. Co.*, 47 N.W.2d. 113 (Minn. 1951) (car with SAA defect not "in use", thus common law negligence must be proven).

State law remedies for defective locomotive parts are reported in the *corpus juris* for a century. The preemption of state law when a "not in use" locomotive causes injury would now create a remedial void and simultaneously place the entire railroad supply industry in a rose garden of immunity. For example, such preemption would suddenly leave non-FELA rail yard contractors without recourse. *See United States v. Northern Pacific, supra*, 254 U.S. 254 (1920) (locomotive moving in switching yard but not in a train formation is not "in use").

The post *Napier* decisions of this Court demonstrate no inclination to extend *Napier's* holding to preempt remedies for injuries actually caused by defective parts, whether such injuries occurred while the locomotive was "in use on the line" or not.

IV. "SWEEPING FIELD PREEMPTION" WOULD DISPLACE EXISTING REMEDIES.

The insidious nature of occupational lung disease was described by this Court over 60 years ago in a FELA case that spawned the "discovery rule" for federal statutes of limitations: *Urie*, 337 U.S. at 169

(1949) (silicosis case).[52] FELA provides the exclusive remedy for railroad workers suing railroads, but the right of those workers to implead responsible third parties, as well as the railroad's derivative rights, are matters that have always been left to state law. *Lee v. Central Georgia Ry. Co.*, 252 U.S. 109 (1920) and *Engvall; supra*, 632 N.W.2d. 560 (indemnity claim against manufacturer for locomotive part causing injury to employee).

Blanket preemption of state law would eliminate the only potential remedy in this case. Petitioners' FELA claim was dismissed on summary judgment for lack of proof or negligence,[53] but beyond the facts of this particular case are recurring examples of traditional state causes of action which would be extinguished under the Third Circuit's rationale.

A. "Take Home" Exposure Cases

In *CSX Transp. Inc. v. Williams*, 608 S.E.2d. 208 (Ga. 2005), the Georgia Supreme Court, answering a certified question, found that the railroad, as a landowner, owed no duty to the families of its workers to warn of potential hazards from second hand contact with asbestos impregnated work

---

[52] In *Ayers*, 538 U.S. 135 (2003) it was noted that the latency period for asbestos related disease is "generally 20-40 years from exposure". 538 U.S. at 142, fn. 4.

[53] JA99; Order Granting Soo Line Railroad's Motion for Summary Judgment.

clothes.[54] This "no duty" rule is the majority position among states having decided the issue.[55] However; the duty of product manufacturers to warn derives from principles of strict liability, and because family members of railroad workers have no independent FELA rights, manufacturers remain their final source of potential relief. "Sweeping preemption" of state law would extinguish those claims, creating immunity for asbestos product manufacturers as well.

B. Plant Railroad Injuries

The definition of "common carrier" is an historically narrow one. *Edwards*, 390 U.S. 538 (1968). Entities including express carriers, inter-urban transit systems and plant railroads do not come under FELA.[56] FRA's regulations do not apply

---

[54] "Take Home" mesothelioma cases among the families of railroad workers have been reported. *Perez v. Southern Pacific*, 883 P.2d 424, (Az. App. 2nd 1993).

[55] Other "take home" exposure decisions finding "no duty" for landowners include, *Widera v. Ettco Wire and Cable Corp.*, 204 A.D. 2d. 306 (N.Y. A.D. 2 Dept. 1994) and *Holmes v. Pneumo Abex*, L.L.C., 2011 Ill. App. LEXIS 653 (Ill. App. 4th Dist. 2011) (citing nine similar decisions). Ill. App. LEXIS 653, p. 10. Immunity of premises owners in toxic take home cases is also achieved by statute. *See Boley v. Goodyear Tire and Rubber*, 929 N.E.2d. 448 (Ohio, 2010) (Ohio statute bans claims against property owners but relief may be sought against "product" manufacturers. 929 N.E.2d. at 454 (O'Conner, J., concurring)

[56] In *Edwards* the court observed that Congress considered, but refused to expand FELA coverage to such entities in the

to rail operations confined to an industrial installation. 49 C.F.R. 209, App. A at 40-41 (1999). Yet, in cases such as *Forrester v. American DieselElectric, Inc.*, 255 F.3d. 1205 (9th Cir. 2001), *Napier* has been applied to preempt state remedies anyway.

In *Forrester* a scrap yard worker suffered an amputation from a locomotive crane without a backup warning. Aware of the fact that locomotive cranes were excluded from FRA safety standards, and that FRA did not regulate such worksites, the *Forrester* Court nevertheless dismissed the case: "[We are] troubled that our refusal (to limit *Napier*) might afford locomotive crane manufacturers broad immunity from tort liability...(but) the force of the sweeping preemption rule under *Napier* remains unimpaired (citation omitted) and, in any event...the rule is too well established to permit such a qualification by a lessor court". 255 F. 3d. at 1210; (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) for the proposition that the Supreme Court retains the prerogative of overruling its own precedent). Others have voiced similar reluctance. *See, e.g., In Re: West Virginia Asbestos Litigation,* 592 S.E.2d. 818 (W.Va.App. 2003) (agreeing that the "specter of innocent plaintiffs left without a remedy should be avoided" yet still finding preemption under *Napier). Id.*, at 822.

1939 Amendments. 390 U.S. at 541, fn. 3, 4.

C. Employees of Bankrupt Railroads

Preemption of state remedies will leave former employees of bankrupt railroads without remedy. In *In Re: Erie Lackawanna Inc.; Erie Lackawanna Ry. Co. v. Henning, et. al.*, 803 F.2d. 881 (6th Cir. 1986), *cert. denied, Consolidated Rail v. Erie Lackawanna, Inc.*, 481 U.S. 1070 (1987), former employees of a bankrupt railroad were diagnosed with asbestos diseases after that railroad was discharged from bankruptcy. 803 F. 2d. at 883[57]. Classifying the discharge order as a "hybrid liquidation - reorganization". (*Id.*, at 884.) the Court upheld an injunction preventing the retirees from suing the reorganized entity. Finding such claims unfair to the stockholders, the Court suggested..."[the retirees] are not without remedy for the alleged injuries...(they) are free to bring suit *against the asbestos manufacturers and installers*". *Id.*, at 885.[58] Yet now,

---

[57] Because these employees were covered under FELA at the time of employment, no state workman's compensation benefits were, or are, available to them in retirement.

[58] In the mid-1960s the Erie Lackawana was listed by Fortune Magazine as the 26th largest transportation company with 15,188 employees. "The 50 Largest Transportation Companies." FORTUNE June 1967; 222. Its bankruptcy in 1972 was one of eight such filing major Eastern Corridor carriers, resulting in a "national rail crises" first addressed by the Court in *Regional Rail Reorganization Cases*, 419 U.S. 102, 108 (1974). The railroad is long gone but the successorship dispute is still alive. *See*, e.g., *Conrail v. Ray*, 632 F. 3d 1279 (D.C. Cir. 2011) (affirming denial of declaratory judgment action which would have prohibited asbestos plaintiffs from using Conrail under common law successorship theory, but not reaching merits..

the Third Circuit forecloses that option based on a breathtaking expansion of field preemption; one never intended by Congress, never envisioned by the *Napier* court, and far outside this Court's established principles.

V. CONCLUSION

For the reasons stated, and for those set forth in Petitioners' Brief the Circuit Court's affirmance of the District Court's grant of summary judgment should be reversed.

Respectfully Submitted,

JOHN D. ROVEN
Counsel of Record
HECTOR L. SANDOVAL
Roven-Kaplan, LLP
2190 N. Loop W., Ste 410
Houston, Texas 77018
Counsel for Amicus Curiae
Academy of Rail Labor Attorneys
(jroven@rovenlaw.com)

AMICUS CURIAE BRIEF

SUPREME COURT, U.S.
FILED
AUG 19 2011
OFFICE OF THE CLERK

No. 10-879

IN THE
Supreme Court of the United States

GLORIA GAIL-KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION, ET AL.,

Respondents.

On Writ Of Certiorari to the United States Court of Appeals For The Third Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONERS

GARY M. PAUL
American Association for Justice
777 6th St. NW, Suite 200
Washington, DC 20001
(202) 965-3500

AAJ President

JEFFREY R. WHITE
Counsel of Record
Center for Constitutional Litigation, P.C.
777 6th St. NW, Suite 520
Washington, DC 20001
(202) 944-2839
jeffrey.white@cclfirm.com

Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 5

I. IN ENACTING THE LOCOMOTIVE INSPECTION ACT FOR THE PROTECTION OF RAILROAD WORKERS, CONGRESS DID NOT INTEND TO PREEMPT INJURED WORKERS' STATE TORT REMEDIES AGAINST THE MANUFACTURERS OF UNREASONABLY DANGEROUS RAILROAD EQUIPMENT. 5

A. **The Strong Presumption Against Preemption of State Tort Remedies Prevails In the Absence of Clear and Unambiguous Proof That Congress Intended Not Only To Preempt the Field of Regulation But Also Specifically to Preclude State Remedies for Injury.** 7

B. **Congress' Purpose In Enacting the Boiler Inspection Act Was Not to Insure Uniformity in Raiload Equipment** 13

C. **The Purpose of Congress Was To Expand the Availability of Tort**

Remedies for Injured Railroad Workers 16

II. THIS COURT'S DECISION THAT THE LIA OCCUPIES THE FIELD OF RAILROAD EQUIPMENT REGULATION DOES NOT ENCOMPASS PREEMPTION OF STATE TORT REMEDIES 21

A. The Occupied Field Recognized By This Court in Napier Does Not Extend To Tort Remedies For Death and Injury 21

B. State Tort Remedies That Afford Compensation For Tortious Injury Are Not Equivalent To State Legislation or Administrative Regulation 24

C. This Court's *Garmon* Decision Does Not Support the Preemption of Tort Damage Awards As Necessarily Equivalent to Preempted State Regulation 31

CONCLUSION 36

TABLE OF AUTHORITIES

CASES

Altria Group, Inc. v. Good, 555 U.S. 70 (2008) 7

Bates v. Dow Agrosciences, LLC, 544 U.S. 431 (2005) 30

Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989) 22

Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54, 468 U.S. 491 (1984) 33

Christopher v. Harbury, 536 U.S. 403 (2002) 10

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 7, 8, 12, 27

Crane v. Cedar Rapids & Iowa City Railway Co., 395 U.S. 164 (1969) 15

Dice v. Akron, Canton & Youngstown Railroad Co, 342 U.S. 359 (1952) 20

English v. General Electric Co., 496 U.S. 72 (1990) 29, 34

Fairport, Painesville & Eastern Railroad Co. v. Meredith, 292 U.S. 589 (1934) 15

Farmer v. Carpenters, 430 U.S. 290 (1977) 33, 34

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 36

Garmon v. San Diego Building Trades Council, 320 P.2d 473 (Cal. 1958) 4, 34

Gilvary v. Cuyahoga Valley Railway Co., 292 U.S. 57 (1934) 21

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 29

Hines v. Davidowitz, 312 U.S. 52 (1941) 6

Ingraham v. Wright, 430 U.S. 651 (1977) 9

Kernan v. American Dredging Co., 355 U.S. 426 (1958) 20

Kurns v. A.W. Chesterton, Inc., 620 F.3d 392 (3d Cir. 2010) ..... *passim*

Law v. General Motors Corp., 114 F.3d 908 (9th Cir. 1997) 13

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 10

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 8, 14

Missouri Pacific Railway Co. v. Humes, 115 U.S. 512 (1885) 10

Napier v. Atlantic Coast Line Railroad Co., 272 U.S. 605 (1926) 3, 6, 21

New York Central Railroad Co. v. Winfield, 244 U.S. 147 (1917) 20, 22, 23

New York Conference of Blue Cross v. Travelers Insurance, 514 U.S. 645 (1995). 31

Norfolk Southern Railway v. Sorrell, 549 U.S. 158 (2007) 15, 20

Oglesby v. Delaware & Hudson Railway Co., 180 F.3d 458 (2d Cir. 1999) 13

Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983) 11, 36

Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987). 24

Retail Clerks International Association, Local 1625, AFL-CIO v. Schermerhorn, 375 U.S. 96 (1963) 33

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 8, 9, 15

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500 (1957) 20

San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959) 32, 34, 35

Savage v. Jones, 225 U.S. 501 (1912) 22

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) ..... *passim*

Simms v. Ruby Tuesday, Inc., 704 S.E.2d 359 (Va. 2011) 18

Southern Railway Co. v. Railroad Commission of Indiana, 236 U.S. 439 (1915) 21

Sprietsma v. Mercury Marine, a Division of Brunswick Corp., 537 U.S. 51 (2002) 12

Tipton v. Atchison, Topeka & Santa Fe Railway, 298 U.S. 141 (1936) 15

Townsend v. Yeomans, 301 U.S. 441 (1937) 22

United Construction Workers, Affiliated With United Mine Workers of America et al. v. Laburnum Construction Corp., 347 U.S. 656 (1954) 35

Urie v. Thompson, 337 U.S. 163 (1949) 15, 16

Wyeth v. Levine, 555 U.S. 555, 129 S. Ct. 1187 (2009) 10, 12, 22

STATUTES

29 U.S.C. §144(a) 31

49 U.S.C. § 20701 6

OTHER AUTHORITIES

45 Cong. Rec. 4034 (1910) 17, 19

Ausness, Richard C., *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 Syracuse L. Rev. 897 (1988) 28

Blackstone, William, *Commentaries on the Laws of England* (1765) 9, 10

Breyer, Stephen G., *Administration and Its Reform* (1982) 31

Breyer, Stephen G., *Regulation and Its Reform* (1982) 26

Calabresi, Guido, *The Costs of Accidents* (1970) 27

Corboy, Philip H. & Smith, Todd A., *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 Am. J. Trial Adv. 435 (1992) 25

Croley, Steven P. & Hanson, Jon D., *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 Mich. L. Rev. 683 (1993) 27, 30

Friedman, Lawrence M., *A History of American Law* (1973) 18

Griffith, Melvin L., *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 160 (1953) 17

H.R. Rep. No. 513, (1910) 19

Henderson, James A., Jr. & Twerski, Aaron D., *Achieving Consensus on Defective Product Design*, 83 Cornell L. Rev. 867 (1998) 14

Horovitz, Samuel B., *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 Ill. L. Rev. 311 (1946) 18

Horwitz, Morton J., *The Transformation of American Law 1870-1960* (1977) 18

Keeton, W. Page, *et al.*, *Products Liability and Safety—Cases and Materials* (2d ed. 1989) 26

Landes, William M. & Posner, Richard A., *The Positive Economic Theory of Tort Law*, 15 Ga. L. Rev. 851 (1980-1981) 26, 31

Licht, Walter, *Working for the Railroad* (1983). 17, 18

McGuire, E. Patrick, *The Impact of Product Liability* (Conference Board 1988) 26

Nader, Ralph & Page, Joseph A., *Automobile-Design Liability and Compliance With Federal Standards*, 64 Geo. Wash. L. Rev. 415 (1996) 25

Restatement (Second) of Torts § 402A (1965) 25

Rustad, Michael L. & Koenig, Thomas H., *Taming the Tort Monster: the American Civil Justice System As a Battleground of Social Theory*, 68 Brook. L. Rev. 1 (2002) 17

S. Rep. No. 432 (1910) 19

Schwartz, Gary T., *Tort Law and the Economy in Nineteenth-Century America: A*

Reinterpretation, 90 Yale L.J. 1717 (1981) 17, 18

Speiser, Stuart, *Lawsuit* (1980) 18

Viscusi, W. Kip, *Reforming Products Liability* (1991) 30

Witt, John Fabian, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement*, 114 Harv. L. Rev. 690 (2001) 17

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Association for Justice (AAJ), respectfully submits this brief as *amicus curiae*. The parties have filed letters of consent to the filing of this amicus brief.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits, including personal injury actions, consumer lawsuits, and employment-related cases. Throughout its 65-year history, the association has championed the fundamental right of every American to legal recourse for redress of wrongful injury.

AAJ views the lower court's decision in this case as one that deprives railroad workers of meaningful remedy against the manufacturers of unreasonably dangerous equipment used by those workers. In addition, the federal court's decision also intrudes on the authority of a State, which most often provides legal recourse to individuals, to administer its own laws.

SUMMARY OF THE ARGUMENT

A crucial issue in this case is whether federal preemption of the field of state legislative and administrative regulation necessarily or impliedly

---

[1] Pursuant to Rule 37.6, Amicus Curiae discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or counsel make a monetary contribution to its preparation.

extends to preemption of common-law tort remedies, despite the absence of evidence that Congress so intended. The lower court held that the Locomotive Inspection Act, which requires railroads to use locomotives or parts and appurtenances thereof that are "safe to operate without unnecessary danger of personal injury," preempts Petitioner's product liability action against the manufacturer of locomotive equipment that contained asbestos and caused the death of a railroad worker.

1. The intent of Congress is the touchstone of preemption, and there is a strong presumption against preemption in the absence of clear indicia of that intent. Because the right to legal remedy for wrongful injury is a fundamental right under the Constitution, courts may not preempt such a cause of action and leave injured persons without remedy unless Congress specifically intended that result. The mere silence of Congress in a statute not directed at railroads rather than manufacturers falls far short.

In addition, at the time Congress enacted the LIA, the common law did not permit workers who were not in privity of contract with equipment manufacturers to recover from manufacturers for injury caused by unsafe products. It would have been impossible for Congress to have intended to preempt a cause of action that did not exist.

The lower court also erred in stating that tort awards would impede Congress' goal of uniformity of railroad equipment regulation. There is no evidence or authority that uniformity was in fact an objective of the LIA. If a state remedy somehow interfered with Congress' goals under the statute, that matter

could be addressed at the appropriate time through conflict preemption. The fact that the Federal Employers' Liability Act created a cause of action for railroad workers for violation of the LIA demonstrates that Congress did not view jury verdicts for injury caused by unsafe equipment as interfering with its regulatory goals.

In fact, the LIA is construed as a supplement to the FELA, which was enacted to expand the tort remedies available to railroad workers and make it easier for injured workers to prevail.

2. This Court's decision in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926), that the LIA occupied the field, precluding state legislation to regulate railroad equipment, cannot be construed as preempting state tort remedies as well. This Court clearly intended the preemptive field to be limited to positive state law. In other instances, Congress has occupied the field of safety regulation but allowed state tort remedies to continue, tolerating any tension that might arise. Indeed, Justice Brandeis, who authored *Napier*, argued strenuously in a previous dissenting opinion that Congress, in enacting the FELA, intended that state tort remedies be available to workers not covered by the act, even as against railroads.

The lower court equated state legislative regulation with tort remedies intended "to persuade defendants to comply with a standard of care." This Court in a line of preemption cases has underscored the crucial distinction between state legislative and administrative regulations, which are direct governmental commands, and tort awards, which do not require a defendant to alter its behavior or

products, but may offer a financial incentive to take reasonable steps voluntarily. The Supremacy Clause is concerned with the exercise of state power awards, not with the indirect influences that merely motivate private voluntary actions.

Nor does this Court's statement in *Garmon v. San Diego Building Trades Council*, 320 P.2d 473 (Cal. 1958) that "regulation can be as effectively exerted through an award of damages" support preemption of Petitioner's common-law remedies. *Garmon* was not concerned with preemption of state law, but with preserving the exclusive primary jurisdiction of the National Labor Relations Board by ousting all courts, state and federal, from cases deciding unfair labor practices. In that context, the quoted statement becomes a tautology. Any state court determination whether an activity is an unfair labor practice intrudes on the NLRB's exclusive jurisdiction over such questions.

Secondly, the picketing activity at issue in *Garmon* was an unfair labor practice under state statute, but a protected activity under federal law, presenting direct conflict. In cases involving labor violence, this Court allowed state tort recoveries because there was no federal interest in protecting the activity which could outweigh the state's interest in providing a damages remedy. Finally, the *Garmon* court placed great weight on the fact that federal remedies were available so that the plaintiff would not be left without recourse.

The intent of Congress is the touchstone of preemption. Precluding state remedies for wrongful injury without clear and manifest proof that Congress specifically so intended raises the danger of

an unelected judiciary substituting its policy preference for those of the representative lawmakers. This Court should reverse the judgment of the court below.

ARGUMENT

I. In Enacting the Locomotive Inspection Act for the Protection of Railroad Workers, Congress Did Not Intend to Preempt Injured Workers' State Tort Remedies Against the Manufacturers of Unreasonably Dangerous Railroad Equipment.

AAJ addresses this Court with respect to the crucial issue of when a court may hold that a federal safety statute preempts a state common law remedy for wrongful injury. In this case, the court below held Petitioner's state law cause of action preempted, not based on an express preemption provision in the statute nor on any clear indication of congressional intent, but rather because the court deemed it to lie within a field of safety regulation occupied by federal law. AAJ urges this Court to make clear that the intent of Congress remains the touchstone of preemption analysis and that courts may not set aside state remedies for wrongful injury in the absence of clear and unambiguous proof that Congress so intended.

Petitioner's decedent, a railroad employee, died of mesothelioma caused by exposure to asbestos in locomotive brake shoes and boilers. The lower court held that Petitioner's product liability cause of action against the manufacturers was preempted by

the Locomotive Inspection Act.[2] The court looked to this Court's holding in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 613 (1926), that "the Boiler Inspection Act, as we construe it, was intended to occupy the field." *Kurns v. A.W. Chesterton, Inc.*, 620 F.3d 392, 396-98 (3d Cir. 2010). AAJ does not dispute the validity of that decision. However, as Justice Stone accurately observed, "Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution." *Hines v. Davidowitz*, 312 U.S. 52, 78 (1941) (Stone, J., dissenting). In this case, the *Napier* court did not indicate any congressional intent to include state tort causes of action within the preempted field. In fact, Justice Brandeis, writing for the Court, explicitly held only "that state *legislation* is precluded" as a result of field preemption. 272 U.S. at 613 (emphasis added).

---

[2] The Locomotive Inspection Act, originally referred to as the Boiler Inspection Act, currently provides:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury;

49 U.S.C. § 20701. References in the text to either the Locomotive Inspection Act (LIA) or Boiler Inspection Act (BIA) refer to this statutory provision.

AAJ submits that, on several important grounds, the lower court's authority and reasoning for denying Petitioner's state law cause of action was woefully insufficient. In fact, Congress clearly did *not* intend to eliminate Petitioner's product liability cause of action.

A. The Strong Presumption Against Preemption of State Tort Remedies Prevails in the Absence of Clear and Unambiguous Proof That Congress Intended Not Only to Preempt the Field of Regulation But Also Specifically to Preclude State Remedies for Injury.

The court below acknowledged that the Locomotive Inspection Act "itself is silent as to any preemptive effect." 620 F.3d at 396. The court acknowledged this Court's fundamental principles that "[t]he purpose of Congress is the ultimate touchstone in every preemption case," *id.* (quoting *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008)), and that "there is a presumption against field preemption unless congressional intent to preempt is clear and manifest." *Id.* (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)). Nevertheless, the lower court gave those principles little effect, substituting instead its own view that the LIA should preempt state law. The court did not inquire whether Congress actually intended such a result, but instead ventured that preemption of state law would be a sensible way to avoid potential conflict with federal regulation:

> [O]ne can easily understand how a state law or action which regulates whether a

> locomotive or any of its parts and appurtenances "are in proper condition and safe to operate" could conflict with federal safety regulations.

Id.

AAJ argues in Part II below that there "is no general, inherent conflict" between federal safety regulations and damage awards against the makers of unreasonably dangerous products. *See Cipollone*, at 505. Even prior to that argument, however, there are powerful reasons why Congress generally does not intend to preempt state common law remedies and may "tolerate whatever tension" there may arise between such remedies and federal occupation of a field of safety regulation. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

Of vital importance, of course, is the states' strong interest in developing and preserving appropriate avenues for legal redress for victims of wrongful injury. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487-89 (1996). This Court emphasized:

> [Because] the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt *state-law causes of action*.

Id. at 485 (emphasis added).

In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), this Court rejected a claim of field preemption where that was not the clear purpose of Congress:

> [Where] Congress legislated here in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress."

Id. at 230 (emphasis added).

Product liability is indisputably a field historically and traditionally occupied by the states.

It is not concern for federalism alone that forms the basis for the very strong presumption that Congress does not intend to preempt state tort remedies, even when it occupies a field of safety regulation. The right to a remedy for wrongful injury is a fundamental right of Americans, citizens both of state and national sovereigns, under the Constitution.

The Founders were certainly familiar with the bedrock common-law principle: "Every right, when withheld, must have a remedy, and every injury its proper redress" in "a legal remedy by suit or action at law." William Blackstone, *3 Commentaries on the Laws of England* *23 & *109 (1765). Justice Powell wrote for this Court in *Ingraham v. Wright*, 430 U.S. 651 (1977), that the Founders intended to incorporate into the Due Process Clause those "essential" rights which "Blackstone catalogued among the 'absolute rights of individuals.'" *Id.* at 661. They consist of the rights to personal liberty, personal property, and personal security, including the right against wrongful injury to the person.

William Blackstone, *1 Commentaries on the Laws of England* *120-34 (1765). Indeed, protection of those absolute rights is "the principal aim of society." *Id.* at *120.

Chief Justice John Marshall, echoing Blackstone, restated this principle for Americans:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). Following the adoption of the Fourteenth Amendment, this Court pronounced it "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" under the Due Process Clause of the Fourteenth Amendment. *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885). More recently, this Court recognized that "a separate and distinct right to seek judicial relief for some wrong" is a fundamental right grounded in multiple provisions of the Constitution of the United States. *Christopher v. Harbury*, 536 U.S. 403, 415 & n.12. (2002).

Even where Congress has intended to preempt state legislation or administrative regulation of an activity, it must not be assumed that Congress also intended to eliminate the common-law causes of action for compensation for wrongful injury caused by that activity. *Wyeth v. Levine*, 555 U.S. 555, ___, 129 S. Ct. 1187, 1194-95 & n.3 (2009). This principle

holds true when Congress has occupied an entire field of safety regulation.

For example, this Court in *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 212 (1983), held that Congress intended to occupy the field of safety regulation of nuclear power facilities. Nevertheless, the following year this Court held that the occupied field did not extend to state tort actions for injury caused by negligence of those facilities. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). Taking note of "Congress' failure to provide any federal remedy for persons injured," Justice White, writing for the majority, concluded that Congress could not have intended to preempt state tort causes of action. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Id.* at 251. Justice Blackmun, in his dissent, agreed with the majority on this point: "The absence of federal regulation governing the compensation of victims . . . is strong evidence that Congress intended the matter to be left to the States." "[I]t is inconceivable that Congress intended to leave victims with no remedy at all. . . ." *Id.* at 264 & n.7 (Blackmun, J., dissenting).[3]

---

[3] It is no answer that "federal law offers recourse to workers exposed to asbestos under the Federal Employer's Liability Act." *Kurns*, 620 F.3d at 400. In both *Medtronic* and *Wyeth* this Court denied preemption of plaintiffs' product liability actions, emphasizing the strong presumption that Congress would not leave injured plaintiffs with no recourse against manufacturers of dangerous drugs or medical devices, even though negligence causes of action against physicians or

Even where Congress has expressly preempted state legislation and regulation, this Court has required a more specific showing of intent to preempt product liability tort remedies. In *Cipollone*, for example, the Court held that the Federal Cigarette Labeling and Advertising Act, enacted in 1965, expressly preempted only state legislation and administrative regulation, but not product liability actions. 505 U.S. at 519. The Court further determined that the statute as amended in 1969, based on the expressed intent of Congress, preempted some but not all causes of action. *Id.* at 530-31. *See also Wyeth*, 129 S. Ct. at 1199-1201 (despite FDA's established and broad authority over drug warning labels, plaintiff's product liability action was not preempted in the absence of specific indication that Congress so intended, particularly where Congress provided no federal damages remedy); *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 69 (2002) (The Federal Boat Safety Act "might be interpreted as expressly occupying the field with respect to state positive laws and regulations but its structure and framework do not convey a 'clear and manifest' intent to go even further and implicitly pre-empt all state common law relating to boat manufacture.").

---

other health care providers were also available to them. *See Wyeth*, at 1191. The crucial fact remains that this Court presumes that Congress does not preempt legal recourse against a wrongdoer regardless of whether the injured person might assert a separate cause of action against a separate wrongdoer. It is simply not credible that Congress, by its mere silence in legislation directed at the liability of railroads, intended so dramatic a result as to bestow immunity upon the manufacturers of railroad equipment.

B. Congress' Purpose in Enacting the Boiler Inspection Act Was Not to Insure Uniformity in Raiload Equipment.

The basis advanced by the lower court for preempting product liability lawsuits under the LIA was that, "Congress' goal of uniform railroad equipment regulation would clearly be impeded by state product liability suits against manufacturers." 620 F.3d at 398. The court below did not base its assessment of congressional purpose on any statutory text, legislative history or guidance from this Court that clearly indicated Congress' intent to preempt common law causes of action against the manufacturers of railroad equipment. Instead, the court looked to decisions by two other appellate courts who declared their discovery, more than 80 years after the fact, that Congress in 1911 preempted product liability lawsuits. 620 F.3d at 398 (citing *Law v. Gen. Motors Corp.*, 114 F.3d 908 (9th Cir. 1997), and *Oglesby v. Del. & Hudson Ry. Co.*, 180 F.3d 458 (2d Cir. 1999)). Nor did those courts rely on legislative text or legislative history. Instead, they found the "virtue of uniform national regulation" to be "self-evident," *Law*, at 910, and speculated that "the uniformity that is a goal of the BIA" would "be accomplished best by including the manufacturer within the statute's [preemptive] coverage." *Oglesby*, at 462.

Such an attempt to invent a legislative intent does violence to the principle that courts must be guided by Congress' actual intention as their touchstone in preemption analysis. This Court rejected a similar argument in *Medtronic* where the Court observed that Congress enacted the Medical

Device Amendments in "response to the mounting consumer and regulatory concern" over widespread injuries caused by unsafe devices such as the Dalkon Shield. 518 U.S. at 476. The Court stated that Medtronic's contention that Congress intended to preempt all common law actions by the victims of unsafe devices was "not only unpersuasive, it is implausible," and "spectacularly odd." *Id.* at 487 & 491. Moreover, it would "have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation." *Id.*

If tort judgments in some fashion were to pose a threat to the effectiveness of federal safety regulation under the LIA, that threat can be removed as a matter of conflict preemption.[4] As this Court pointed out in *Rice*, a field preemption case,

> [P]ossibilities of conflict and repugnancy are conjured up. . . . But it will be time to consider such asserted conflicts between the State and Federal Acts

---

[4] It is also worth noting that the much-feared patchwork or "crazy-quilt" of fifty inconsistent state standards for defective products is vastly overstated. Although there is some variation among the states with respect to defenses or damages, there is general agreement on the standard for an unreasonably dangerous product. *See, e.g.*, James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 Cornell L. Rev. 867, 887 (1998) (the "overwhelming majority" of courts apply the same "risk-utility approach in determining design defects.").

> when and if they arise. Any such objections are at this stage premature.

331 U.S. at 237.

Finally, the contention that Congress intended to eliminate tort remedies because jury verdicts would undermine the uniformity of federal regulations is blatantly contradicted by the FELA itself, which, as the court below indicated, authorizes a negligence cause of action for violation of the LIA. 620 F.3d at 400. The LIA "simply outline[s] a general standard which may be more specifically articulated in rules" and which may provide the basis for a jury verdict of negligence against the railroad. Thus, the FELA places in the hands of juries the question of whether locomotives and their appurtenances "are in proper condition and safe to operate without unnecessary danger of personal injury." *See Urie v. Thompson*, 337 U.S. 163, 190-91 (1949). Congress clearly was not concerned that jury verdicts might undermine the uniformity of railroad safety regulations.

In addition, FELA displaces state causes of action only for claims by railroad employees against their employers. *See Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 165 (2007). Outside of that exclusive statutory remedy, the states are "at liberty to afford any appropriate remedy." *Tipton v. Atchison, Topeka & Santa Fe Ry.*, 298 U.S. 141, 148 (1936). This Court has recognized that such remedies may include state-law causes of action by non-employees. *See, e.g., Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164 (1969); *Fairport, Painesville & E. R.R. Co. v. Meredith*, 292 U.S. 589 (1934). To hold that uniformity of regulation must be shielded from the

impact of differing tort outcomes would require this Court to overturn such longstanding precedents. Surely congressional intent to confer a broad immunity from liability on a manufacturing sector, must be based on more than congressional silence in a statute dealing solely with the liability of railroads.

C. The Purpose of Congress Was to Expand the Availability of Tort Remedies for Injured Railroad Workers.

The true intent of Congress in enacting the LIA and related statutes was to make it easier for workers and their families to recover for the wrongful injuries and deaths of railroad employees. Preempting their state law causes of action against the makers of unsafe equipment is inconsistent with this purpose.

This Court has made clear that the Boiler Inspection Act and the Safety Appliance Acts, are not to be viewed in isolation. They "are substantively if not in form amendments to the Federal Employers' Liability Act." *Urie v. Thompson*, 337 U.S. 163, 189 (1949). The LIA "does not purport to confer any right of action upon injured employees," but rather proof of violation of the LIA is sufficient to show negligence as a matter of law under the FELA. *Id.* at 188. As this Court concluded, Congress enacted the LIA with "the purpose and effect of facilitating employee recover, *not of restricting such recovery or making it impossible.*" *Id.* at 189 (emphasis added).

The growth of the railroads brought progress and prosperity to Americans in all parts of the country, *see* Gary T. Schwartz, *Tort Law and the*

Economy in Nineteenth-Century America: A Reinterpretation, 90 Yale L.J. 1717, 1748 (1981). However, the "dark and bitter" price of progress was the ever-growing numbers of workers killed and injured by huge machines that lacked basic safety protections. Melvin L. Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 160, 163 (1953). "In the second half of the nineteenth century, the United States experienced an accident crisis like none the world had ever seen and like none any Western nation has witnessed since." John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement*, 114 Harv. L. Rev. 690, 694 (2001).

The rates of death and serious injury to railroad workers were astronomical. *See generally* Walter Licht, *Working for the Railroad* 190-200 (1983). In 1890 one railroad worker in every three hundred was killed on the job. Among brakemen, one in every hundred died in work accidents *each year*. Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: the American Civil Justice System As a Battleground of Social Theory*, 68 Brook. L. Rev. 1, 27 & n.167 (2002). The Interstate Commerce Commission reported that in 1908, the year in which Congress enacted the FELA, injuries and deaths to trainmen totaled 281,645. 45 Cong. Rec. 4034 (1910).

American courts at that time offered little in the way of either justice or compensation for workers and their families who were ruined victims of careless railroad companies. The defenses of contributory negligence, assumption of the risk, and the fellow servant doctrine were devised and

promoted by the railroads' legal departments and adopted by courts who deemed it necessary to shield America's fledgling industries from the burdens of liability. *See*, Lawrence M. Friedman, *A History of American Law* 409-11 (1973); Morton J. Horwitz, *The Transformation of American Law, 1870-1960* 85-89 (1977); Stuart Speiser, *Lawsuit* 120, 122, 124-26 (1980). AAJ's founder noted that, prior to workers's compensation laws, approximately 80 percent of workers and workers' families lost their tort actions against their employers. Samuel B. Horovitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 Ill. L. Rev. 311, 311 (1946), *cited in Simms v. Ruby Tuesday, Inc.*, 704 S.E.2d 359, 361 (Va. 2011).

A broad survey of reported tort decisions confirms that the common law courts of the late 19th Century were notably hostile to claims by injured employees, especially railroad workers. Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 Yale L.J. 1717, 1719-20 (1981). "Workers disabled in accidents and the widows and families of deceased railwaymen faced a grim and uncertain future." Walter Licht, *supra*, at 197.

Congress responded in 1908 by passing what has become the current Federal Employers Liability Act. Its purpose was most expansively stated by the Senate Committee on the Judiciary in a report accompanying an amendment to the Act in 1910:

> The tremendous loss of life and limb on the railroads of this country is appalling. . . .

> It was the intention of Congress . . . to shift the burden of the loss resulting from these casualties from "those least able to bear it" and place it upon those who can, as the Supreme Court said in [*St. Louis & Iron Mountain & Southern Railway Co.. v. Taylor*, 210 U. S. 281, 295-296 (1908)], "measurably control their causes." . . .
>
> This public policy which we now declare is based upon the *failure of the common-law rules* as to liability for accident, to meet the modern industrial conditions.

S. Rep. No. 432 (1910); 45 Cong. Rec. 4034, 4041 (1910) (emphasis added).

The House Committee on the Judiciary similarly stated:

> It is manifest . . . that the purpose of the statute was to *extend and enlarge the remedy* provided by law to employees engaged in interstate commerce in cases of death or injury to such employees while engaged in such service.

H.R. Rep. No. 513 (1910) (emphasis added). This Court upheld the statute's validity. *Second Employers' Liability Cases* [*Mondou v. New York, N.H. & H.R. Co.*], 223 U.S. 1 (1912).

Justice Louis Brandeis, a decade prior to authoring this Court's decision in *Napier*, argued strenuously that Congress passed the FELA with the intent of restoring the tort remedies of railroad

workers that the courts had seriously undermined. *N.Y. Cent. R. Co. v. Winfield*, 244 U.S. 147, 158-65 (1917) (Brandeis, J., dissenting).

The means Congress chose for accomplishing this purpose was to enable workers to present their cases to juries of their fellow Americans, overcoming judge-made common law barriers and judicial bias in favor of the railroads. *See Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 508-09 (1957). For that reason, Congress made the right to trial by jury "part and parcel" of the remedy under FELA. *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952). This Court found it "clear that the general congressional intent [behind FELA] was to provide liberal recovery for injured workers." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958).

In sum, the purpose of Congress in enacting the FELA and the Locomotive Inspection Act, for which the FELA provides a federal cause of action was to make it easier for railroad workers to bring and prevail in tort lawsuits for employment-related injuries. FELA is the exclusive remedy for the injured railroad employee against the employer. *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 165 (2007). But there is no indication that Congress intended to restrict or eliminate state causes of action by railroad workers against third parties who may be responsible for the worker's injury.

II. THIS COURT'S DECISION THAT THE LIA OCCUPIES THE FIELD OF RAILROAD EQUIPMENT REGULATION DOES NOT ENCOMPASS PREEMPTION OF STATE TORT REMEDIES.

A. The Occupied Field Recognized By This Court in *Napier* Does Not Extend to Tort Remedies for Death and Injury.

In *Napier*, this Court held that Congress in enacting the LIA "intended to occupy the field" of railroad equipment so as to preclude state legislation." 272 U.S. at 607. The lower court, however, expanded the scope of the preemptive field to encompass tort lawsuits. There is no basis in *Napier* to support such a drastic federal intrusion into a traditional area of state law. Indeed, a fair reading of this Court's decision argues against such preemption.

First, there is no indication that this Court employed the term "legislation" casually or in a manner that might impliedly include common law causes of action. A decade earlier, the Court similarly held that in enacting the Safety Appliance Acts, "Congress has so far *occupied the field of legislation* relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further *legislation* on that subject." *S. Ry. Co. v. R.R. Comm'n of Ind.*, 236 U.S. 439, 447 (1915) (emphasis added). *See also Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57, 60 (1934) (noting that congressional power "excludes and supersedes state *legislation*," citing *Napier*). It was also well-established that where Congress has occupied a limited field of regulation, "the intent to supersede

the exercise by the state of its police power as to matters not covered by the federal legislation is not to be implied." *Townsend v. Yeomans*, 301 U.S. 441, 454 (1937); *Savage v. Jones*, 225 U.S. 501, 533 (1912) (same).

More recently, this Court has indicated that deference to Congress' responsibility for balancing important but competing priorities requires that courts preserve state tort remedies, even where Congress has occupied the regulatory field. In *Silkwood*, for example, this Court found no inconsistency between "vest[ing] the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Silkwood to recover for injuries caused by nuclear hazards." 464 U.S. at 258. Rather, "Congress intended to rely solely on federal expertise in setting safety standards, and to rely on . . . juries to remedy whatever injury takes place," *Id.* at 264. There is no basis for preemption where Congress has "decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Wyeth*, 129 S. Ct. at 1200 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989)).

Finally, to the extent that any ambiguity exists regarding the boundaries of the federally occupied field described by Justice Brandeis for this Court in *Napier*, it is clear from Justice Brandeis' strong dissent in *New York Central Railroad Co. v. Winfield*, 244 U.S. 147 (1917), that he did not intend to include common law remedies within that field.

This Court held in *Winfield* that an injured railroad worker, who could not recover under FELA

because his employer was not negligent, was barred from seeking recovery under the state workers compensation statute. *Id.* at 150-51.

Justice Brandeis, in dissent, wrote that the FELA was enacted in reaction to the development of such judicial doctrines as contributory negligence, assumption of the risk, and the fellow servant's doctrine, which "practically abolished the liability of employers to employees; and in so doing they worked great hardship and apparent injustice. The wrongs suffered were flagrant; the demand for redress insistent; and the efforts to secure remedial legislation widespread." *Id.* at 160. However, the FELA at that time excluded many workers, leading Justice Brandeis to declare:

> The scope of the act is so narrow as to preclude the belief that thereby Congress intended to deny to the states the power to provide compensation or relief for injuries not covered by it.

Id at 163-64. He added:

> It was not the purpose of the act to deny to the states the power to grant the *wholly new right* to protection or relief in the case of injuries suffered otherwise than through fault of the railroads.

Id. at 164 (emphasis in original).

The only proper reading of *Napier's* holding is that the LIA preempts the limited field of state legislation requiring certain safety standards for locomotives and their appurtenances. This Court's

opinion cannot reasonably be construed as preempting state tort remedies against third parties and the author of that opinion clearly did not intend such an interpretation.

B. State Tort Remedies That Afford Compensation for Tortious Injury Are Not Equivalent to State Legislation or Administrative Regulation.

The court below nevertheless held that occupation of the field of railroad equipment regulation necessarily preempts not only state legislative and administrative regulation, but also product liability lawsuits, "the purpose of which is, in part, to persuade defendants to comply with a standard of care established by the state." 620 F.3d. at 398. This Court has made clear that federal preemption is indeed concerned with setting aside positive state commands, but does not set aside damage awards that merely "persuade" manufacturers to make reasonably safe products.

This Court has stated that the "common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987). Tort law lays down broadly applicable general principles, not specific standards. This Court in *Pilot Life* concluded that tort law is not a state law which "regulates insurance." *Id.* Product liability, for example, is premised on the obligation of all product suppliers to refrain from marketing

products that are unreasonably dangerous. *See* Restatement (Second) of Torts § 402A (1965).

The crucial distinction for purposes of preemption analysis is that regulation is a direct command by the government to an individual or company to conform its conduct (or its product) to certain requirements. A tort judgment, by contrast, does no more than require that the individual or company pay for harm caused by its failure to act reasonably (or market its product in reasonably safe condition). It does not actually require the defendant to alter its conduct or its product. *See* Philip H. Corboy & Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 Am. J. Trial Adv. 435, 455-57 (1992); Ralph Nader & Joseph A. Page, *Automobile-Design Liability and Compliance With Federal Standards*, 64 Geo. Wash. L. Rev. 415, 437-39 (1996).

A compensatory award is not equivalent to an administrative penalty merely because it may "persuade" the defendant to alter its conduct. By holding otherwise, 620 F.3d at 398, the lower court lost sight of the central concern of the law of preemption: the division of power between the state and national government.

A manufacturer may well be influenced by liability to change its product, but it is not required to do so. The product may already have been taken off the market or replaced by a newer, safer model. The manufacturer may decide to address the hazard by a warning or by a design change not considered by the jury. It could also rationally decide, balancing the probability of future serious harm against the

cost of eliminating the risk, simply to compensate any future victims. Stephen Breyer, *Regulation and Its Reform* 175 (1982). In fact, many manufacturers sued for injury caused by their products do *not* change the product's design. A survey of risk managers of Fortune 1000 corporations with actual product liability experience reported that as a result over 35 percent had improved their product warnings and/or instructions and over 30 percent had improved the safety of their designs. E. Patrick McGuire, *The Impact of Product Liability* 18 (Conference Bd. 1988), summarized in W. Page Keeton, *et al.*, *Products Liability and Safety—Cases and Materials* 1033-34 (2d ed. 1989).

This is precisely how tort law is designed to operate. The law requires socially useful activities to pay their own way by internalizing the costs of the harms they cause. It falls to private individuals to make the decisions required to minimize those costs, and market forces cause these decisions to result in the most efficient level of operations. William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 Ga. L. Rev. 851, 871-77 (1980-1981).

Federal law does not preempt private decisions. As Justice Blackmun explained:

> [The manufacturer] may decide to accept damages awards as a cost of doing business and not alter its behavior in any way. Or, by contrast, it may choose to avoid future awards . . . through a variety of alternative mechanisms, . . . The level of choice that a defendant retains in shaping its own

> behavior distinguishes the indirect regulatory effect of the common law from positive enactments such as statutes and administrative regulations.

Cipollone, 505 U.S. at 536-37 (Blackmun, J., concurring in part, dissenting in part).

Achieving safety by government regulation is a much different regime, premised on the belief that the marketplace cannot achieve the level of safety society demands. Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 Mich. L. Rev. 683, 736 (1993). Regulators therefore command manufacturers to do that which they would not do voluntarily.

In his classic exposition, Judge Calabresi contrasts the indirect influence exerted on the market by tort law ("general deterrence") with governmental regulatory mandates ("specific deterrence"). *See* Guido Calabresi, *The Costs of Accidents* 68-129 (1970). As one scholar summarized:

> [U]nder a general deterrence regime, manufacturers, not government officials, make decisions about product safety. . . . In contrast, specific deterrence mandates a particular choice determined by the legislature or an administrative agency. *It is a raw exercise of state power.*

Richard C. Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative*

Compensation Systems, 39 Syracuse L. Rev. 897, 927 (1988) (emphasis added). *See also* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Studies 357, 359 (1984) (explaining that administrative regulation is a centralized system of government control, while tort law is essentially a market-based system). The Supremacy Clause is concerned with the exercise of government power, not with the private decisions of individuals.

This Court has closely adhered to this distinction. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the plaintiff sought personal injury damages for plutonium contamination of a worker allegedly due to the defendant's negligent operation of a federally licensed nuclear facility. Justice White, writing for the majority, reaffirmed the Court's position that the Atomic Energy Act preempted the field of safety regulation of nuclear power facilities. *Id.* at 249. Nevertheless, congressional silence with respect to common law actions indicated to the Court that "Congress assumed that traditional principles of state tort law would apply with full force." *Id.* at 255. Justice Blackmun, dissenting, nevertheless agreed on this point:

> Whatever compensation standard a State imposes, whether it be negligence or strict liability, a licensee remains free to continue operating under federal standards and to pay for the injury that results. . . . Compensatory damages therefore complement the federal regulatory standards, and are an implicit part of the federal regulatory scheme.

Silkwood, 464 U.S. at 264 (Blackmun, J., dissenting).

This Court subsequently explained:

> The effects of *direct* regulation on the operation of federal projects are significantly more intrusive than the *incidental* regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation. We believe Congress may reasonably determine that *incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.*

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185-86 (1988) (emphasis added). Similarly, in *English v. General Electric Co.*, 496 U.S. 72, 85 (1990), the Court stated:

> We recognize that the claim for intentional infliction of emotional distress at issue here may have some effect on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. . . . Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the preempted field.

More recently, this Court stated:

> An occurrence that merely motivates an optional decision does not qualify as a requirement. The Court of Appeals was therefore quite wrong when it assumed that any event, such as a jury verdict, that might "induce" a pesticide manufacturer to change its label should be viewed as a requirement. . . .
>
> A requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement.

Bates v. Dow Agrosciences, LLC, 544 U.S. 431, 443-45 (2005).

Product liability is a particularly clear example of the indirect impact of remedies on market forces. Because real-world markets do not provide perfect consumer information, manufacturers are able to "externalize" the injury costs of their products, forcing consumers, workers, taxpayers, and society generally to subsidize unsafe products by bearing part of the cost of the injuries they cause. This places the manufacturer who invests in safety at a competitive disadvantage. Product liability rules, by assessing risk retrospectively, compensate for imperfect consumer information. Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 Mich. L. Rev. 683, 707-08 (1993). *See also* W. Kip Viscusi, *Reforming Products Liability* 66 (1991) ("The purpose of products liability is to fill the gaps left by market imperfections and to replicate the incentives that would have been generated had markets been functioning perfectly.").

Product liability remedies therefore reflect a policy of making dangerous products pay their own way, that is, internalizing costs to achieve an efficient level of manufacturing operations. William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 Ga. L. Rev. 851, 871-77 (1980-1981). Viewed another way, the law requires the product's purchase price to reflect the costs of injuries so the "cheapest cost avoider" makes the most efficient allocation of resources. *See* Stephen G. Breyer, *Administration and Its Reform* 175 (1982) (favoring the rule that is "likely to place costs on the party best able to avoid them").

Highly persuasive is this Court's decision in *New York Conference of Blue Cross v. Travelers Insurance*, 514 U.S. 645 (1995). The Court held that a state surcharge on hospital bills covered by commercial insurers are not preempted by 29 U.S.C. §144(a), which preempts state law that "relate to any employee benefit plan." The charges made nonprofit insurance "more attractive (or less unattractive) as insurance alternatives and thus have an indirect economic effect on choices made by insurance buyers, including ERISA plans." *Id.* at 659. Nevertheless, "laws with only an indirect economic effect on the relative costs of various health insurance packages" are not preempted. *Id.* at 662.

C. This Court's *Garmon* Decision Does Not Support the Preemption of Tort Damage Awards As Necessarily Equivalent to Preempted State Regulation.

The court below held that preemption of the field of railroad equipment regulation by legislation,

as announced in *Napier*, necessarily preempts plaintiff's product liability lawsuit as well. The court looked to *Law* and *Oglesby*, both of which cited *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959), for the proposition that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *Id.* at 247. AAJ submits that the *Garmon* dictum was uttered in a different context and is simply irrelevant to the preemption question presented in this case.

1. Garmon's concern was not federal preemption of state substantive law, but the exclusive jurisdiction of the NLRB over unfair labor practices.

In *Garmon*, an employer filed suit in California state court against labor unions that had picketed plaintiff's lumber business. The court awarded damages under a state statute authorizing damages for unfair labor practices. The Supreme Court reversed, holding that the claim should have been filed first with the National Labor Relations Board. Justice Frankfurter, writing for the majority, announced what has become known as the *Garmon* rule: "When an activity is arguably subject to section 7 [concerted activities] or section 8 [unfair labor practices] of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." *Id.* at 245.

Congress did not preempt state regulation of certain labor activities, but rather completely deprived the courts—state and federal—of jurisdiction in favor of the NLRB, the "special tribunal" that Congress set up for this purpose. *Id.* at 242.

As this Court later explained, *Garmon* was chiefly concerned with establishing the remedial scheme provided by the National Labor Relations Board "by ensuring that the primary responsibility for interpreting and applying this body of law remain[ed] with the NLRB. . . . based on the primary jurisdiction rationale." *Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Local 54*, 468 U.S. 491, 502 (1984). *See also Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96 (1963) ("*Garmon*, however, does not state a constitutional principle; it merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations; and it did not present the problems . . . whether the Congress had precluded state enforcement of select state laws.").

Thus *Garmon* involved the ouster of both federal and state courts from *any* regulation of certain labor activities. When considered in the context of preemption of state law, the quoted statement becomes a tautology. Clearly a state remedy may exert some influence on private conduct, albeit indirect. *Garmon*, however, does not address the distinction between direct state mandates, which this Court has stated may be preempted, and indirect financial incentives, which may not.

For that reason, this Court has stated, preemption of the field under the National Labor Relations Act does not extend to tort causes of action that have only a "peripheral" effect on the federal regulatory scheme and which further state interests in protecting their citizens. *Farmer v. Carpenters*, 430 U.S. 290, 296-97 (1977). In such cases, this Court indicated, state tort remedies are not deemed to fall within the preempted field, due to the State's

interest in protecting the health and well-being of its citizens. *Id.* at 302-03. *See also English v. Gen. Elec. Co.*, 496 U.S. 72, 86 n.8 (1990) (Reliance on *Garmon* "to argue that petitioner's [tort] claim falls within the preempted field" was "misplaced.")

2. Garmon addressed the special problem of state potential conflict between federal and state statutory law, not field preemption of common law remedies.

The award of damages against the unions in *Garmon* was based on the California court's determination that the union's peaceful picketing was an unfair labor practice in violation of California statute, not the common law. *See Garmon v. San Diego Bldg. Trades Council*, 320 P.2d 473, 481 (Cal. 1958). This Court reversed, holding that the union activity was arguably protected by federal labor law and that, under the comprehensive regime Congress established to govern labor relations, courts must yield to the "exclusive primary competence" of the NLRB to make that determination. 359 U.S. at 245.

Justice Frankfurter, writing for the majority in *Garmon*, made this clear, distinguishing a line of cases which upheld state damage awards in cases involving labor violence, which is clearly not a protected labor activity and where the states had a strong interest in making the tort remedy available.

> It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. . . . State

> jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction.

Id. at 247-48 (citations omitted).

In this case, the manufacture and sale of unreasonably dangerous railroad equipment containing asbestos is not a federally protected activity, while the states have a clear interest in providing legal redress and compensation for their citizens. *Garmon* thus does not support preemption of Petitioner's cause of action.

3. Plaintiff in Garmon was not wholly deprived of a remedy for injury.

The *Garmon* Court carefully conditioned its ouster of state court jurisdiction to award compensation on the availability of alternative federal remedies. 359 U.S. at 243. Justice Harlan, concurring, cautioned that, where Congress has not provided such a remedy, "there is no ground for concluding that . . . [state] liabilities for tortious conduct have been eliminated." *Id.* at 252 (Harlan, J., concurring) (quoting *United Const. Workers, Affiliated With United Mine Workers of Am. et al. v. Laburnum Const. Corp.*, 347 U.S. 656, 665 (1954)).

* * *

In this case, despite the fact that Congress occupied the field with respect to safety regulation of railroad equipment, there is no indication that

Congress also intended to eliminate the state tort remedies of workers against the manufacturers of unsafe equipment. The lower court's preemption of those remedies rests on little more than the court's own belief that it would have been wise and sensible for Congress to do so.

This Court has cautioned that in addressing preemption issues, "courts should not assume the role which our system assigns to Congress." *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n.*, 461 U.S. 190, 223 (1983). Careful attention to the *actual* intent of Congress is the essential touchstone of preemption. The lower court erred in denying Petitioner her state remedy in the absence of clear and unambiguous proof that Congress intended that result. To hold otherwise, "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which it dislikes." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

CONCLUSION

For the above reasons, the decision of the court below should be reversed.

Respectfully submitted,

Jeffrey R. White
Counsel of Record
Center for Constitutional Litigation, P.C.
777 6th St. NW, Suite 520
Washington, DC 20001
(202) 944-2839
jeffrey.white@cclfirm.com
Attorney for Amicus Curiae

August 19, 2011

AMICUS CURIAE BRIEF

No. 10-879

IN THE

Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, WIDOW IN HER OWN RIGHT
Petitioner,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

LOUIS P. WARCHOT
DANIEL SAPHIRE *
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, S.W.
Washington, D.C. 20024
(202) 639-2505
DSaphire@aar.org

* Counsel of Record

Counsel for Amicus

October 7, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	4
SUMMARY OF THE ARGUMENT	4
ARGUMENT	6
I. THE LOCOMOTIVE INSPECTION ACT PREEMPTS STATE LAWS THAT SEEK TO IMPOSE DESIGN REQUIREMENTS ON LOCOMOTIVES, INCLUDING STATE LAW-BASED TORT SUITS ALLEGING DESIGN DEFECTS	6
A. Congress Determined That Railroad Safety Should Be Regulated Comprehensively and Uniformly at the Federal Level and Preempted State Efforts to Regulate Rail Safety	6
B. As a Component of the Comprehensive Scheme of Rail Safety Regulation the LIA Vests Authority to Regulate Locomotive Design Exclusively With the Federal Regulator Regardless of the Location of the Locomotive	8

TABLE OF CONTENTS—Continued

Page

C. The LIA is Part of a Scheme of Railroad Safety Laws That Are Premised On the Importance of Maintaining Uniformity of Rail Equipment and Safety Regulation 14

D. The LIA's Occupation of the Field of Locomotive Safety Preempts State Tort Actions 18

II. LIA PREEMPTION IS NOT DEPENDENT ON THE AVAILABILITY OF A FELA REMEDY NOR DOES IT FORECLOSE ALL STATE LAW REMEDIES 21

A. The Sole Obligation of Both Railroads and Manufacturers With Respect to Locomotives is to Comply With the Standards Set Forth in and Promulgated Under The LIA and Any Liability Must Be Premised on Those Obligations 23

B. Preemption of Petitioners' State Law Design Defect Claims Should Not Impact Contribution or Indemnity Claims That Might Otherwise Be Available to Railroads Against Manufacturers 29

CONCLUSION 34

TABLE OF AUTHORITIES

CASES	Page(s)
Angell v. Chesapeake & Ohio Ry. Co., 618 F.2d 260 (4th Cir. 1980)	10
Bailey v. Cent. Vermont Ry., 319 U.S. 350 (1943)	30
Bell v. Illinois Cent. R.R., 236 F.Supp.2d 882 (N.D. Ill. 2001)	26
Brady v. Term. R.R. Ass'n, 303 U.S. 10 (1938)	10
Burlington Northern R.R. v. Farmers Union Oil Co. of Rolla, 207 F.3d 526 (8th Cir. 2000)	31
Burlington Northern Santa Fe Ry., et al. v. Doyle, 186 F.3d 790 (7th Cir. 1999)	4, 15
Carrillo v. ACF Industries, Inc., 980 P.2d 386 (1999)	4, 15
Carter v. Consolidated Rail Corp., 709 N.E.2d 1235 (Ohio App. 1998)	26
Cazad v. Cheasapeake & Ohio Ry. Co., 622 F.2d 72 (4th Cir. 1980)	31
Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)	19
Consolidated Rail Corp. v. Penn. Pub. Util. Com'n, 536 F.Supp. 653 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3rd Cir. 1982), *aff'd*, 461 U.S. 981 (1983)	12, 17
Crane v. Cedar Rapids & Iowa City Ry., 395 U.S. 164 (1969)	25
Crockett v. Long Island R.R., 65 F.3d 274 (2d Cir. 1995)	10
CSX Transp., Inc. v. City of Plymouth, Michigan, 92 F.Supp.2d 643 (E.D. Mich 2000), *aff'd*, 283 F.3d 812 (6th Cir. 2002)	4

TABLE OF AUTHORITIES—Continued

Page(s)

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) 3, 18
Dodge v. Union Pac. R.R., 2007 WL 1432033 (D. Ore. 2007) 20
Ellison v. Shell Oil Co., 882 F.2d 349 (9th Cir. 1989) 30
Engval v. Soo Line R.R., 632 N.W.2d 560 (Minn. 2001) 32, 33
Fairport, P. & E. R.R v. Meredith, 292 U.S. 589 (1934) 25
Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) 10
Forrester v. Amer. Dieselelectric, Inc., 255 F.3d 1205 (9th Cir. 2001) 23
Geier v. American Honda Motor, Inc., 529 U.S. 861 (2000) 18, 19
Gen. Motors Corp. v. Kilgore, 853 So.2d 171 (Ala. 2002) 12
In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, 188 F.Supp.2d 1341 (S.D. Ala. 2000) 11, 27
In Re Train Collision at Gary, Ind. on January 18, 1993, 670 N.E.2d 902 (Ind. App. 1996) 11
In re West Virginia Asbestos Litigation, 592 S.E.2d 818 (W. Va. 2003) 8
Jacobson v. N.Y., N.H. & H. R.R., 206 F.2d 153 (1st Cir. 1953) 25
King v. Southern Pac. Transp. Co., 855 F.2d 1485 (10th Cir. 1988) 31
Kurns v. Airco Welders Supply, Inc., et al., No. 1746 EDA 2008 (Pa. Super. Ct. 2008) 2

TABLE OF AUTHORITIES—Continued

Page(s)

Kurns v. A.W. Chestertion, Inc., 620 F.3d 392 (3d Cir. 2010).....7, 16, 28
Lane v. R.J. Simms, 241 F.3d 439 (5th Cir. 2001)..... 31, 32
Law v. General Motors Corp., 114 F.3d 908 (9th Cir. 1997)..... 12, 20
Lyle v. Atchison, Topeka & San Francisco Ry. Co., 177 F.2d 221 (7th Cir. 1949)..... 10
Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983).....11, 18, 24
McGinn v. Burlington Northern R.R., 102 F.3d 295 (7th Cir. 1996)..... 10
Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)..... 20
Michigan Southern R.R. v. City of Kendallville, Ind., 251 F.3d 1152 (7th Cir. 2001)..... 16
Monheim v. Union R.R., ___ F.Supp.2d ___, 2011 WL 1527798 (W.D. Pa. 2011)... 24, 31
Mosco v. Balt. & Ohio R.R., 817 F.2d 1088 (4th Cir. 1987)..... 10
Munns v. CSX Transp. Inc., 2009 WL 805133 (N.D. Ohio 2009) 24, 31
Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926).....*passim*
Nickels v. Grand Trunk Western R.R., 560 F.3d 426 (6th Cir. 2009)..... 32
Norfolk Southern Ry. Co. v. Denson, 774 So.2d 549 (Ala. 2000)..... 24, 31
Norfolk Southern Ry. v. Shanklin, 529 U.S. 344 (2000)..... 4
Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135 (2003)..... 30

TABLE OF AUTHORITIES—Continued

Page(s)

Norris v. Cent. of Georgia R.R., 635 S.E.2d 179 (Ga. App. 2006) 32
Ogelsby v. Delaware & Hudson Ry. Co., 180 F.3d 458 (2nd Cir. 1999) 11
Oglesby v. Del. & Hudson Ry. Co., 964 F.Supp. 57 (N.D. N.Y. 1997), *rev'd*, 180 F.3d 458 (2nd Cir. 1999) 27
Poleto v. Consolidated Rail Corp., 826 F.2d 1270 (3rd Cir. 1987) 31
Riegel v. Medtronic, Inc., 552 U.S. 312 (2008) 18, 20
San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) 19
Seaman v. A.P. Green Ind., Inc., 707 N.Y.S. 2d 299 (N.Y. S. Ct. 2000) 13
Scheiding v. General Motors, 993 P.2d 996 (Cal. 2000) 20, 25
Scott v. Chicago, R.I. & Pac. R.R., 197 F.2d 259 (8th Cir. 1952) 25
Shanks v. Delaware, Lackwanna & Western R.R., 239 U.S. 556 (1916) 22
Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945) 13
Southern Pac. Co. v. Gileo, 351 U.S. 493 (1956) 23
Southern R.R. v. Railroad Comm'n, 236 U.S. 439 (1915) 15
Southern Ry. Co. v. Lunsford, 297 U.S. 398 (1936) 9
Springston v. Consolidated Rail Corp., 863 F.Supp. 535 (N.D. Ohio 1994), *aff'd*, 130 F.3d 241 (6th Cir. 1997) 11, 17, 24

TABLE OF AUTHORITIES—Continued

Page(s)

Steffey v. Soo Line R.R., 498 N.W.2d 304 (Minn. App. 1993) 25
Stephens v. Southern Pac. Transp. Co., 991 F.Supp. 618 (S.D. Tex. 1998) 30
Union Pac. R.R. v. Motive Equip., Inc., 714 N.W.2d 232 (Wisc. App. 2006) 33
United States v. Allegheny Ludlam Steel Corp., 406 U.S. 742, 743 (1972) 13
United States v. Baltimore & Ohio R.R., 293 U.S. 454 (1935) 11
United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982) 7
Urie v. Thompson, 337 U.S. 163 (1949) 22
Waylander-Peterson Co. v. Great Northern Ry. Co., 201 F.2d 408 (8th Cir. 1953) 31
Waymire v. Norfolk and Western Ry. Co., 218 F.3d 773 (7th Cir. 2000) 31

STATUTES AND REGULATIONS

Act of April 14, 1910, c. 160, 36 Stat. 298 ... 15
Act of Aug. 11, 1939, c. 685, 53 Stat. 1404 .. 23
Boiler Inspection Act, c. 103, 36 Stat. 913 (1911) 9, 14
Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (1966) 9
Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* ..... *passim*
Federal Railroad Safety Act, Pub. L. No. 91-458, 84 Stat. 971 (1970) ..... *passim*
Safety Appliances Act, c. 196, 27 Stat. 531 (1893) 3, 14, 15, 24, 30
45 U.S.C. §53 22
45 U.S.C. §421 15

TABLE OF AUTHORITIES—Continued

	Page(s)
49 U.S.C. §20101	15
49 U.S.C. §20106(b)(1)(A)	27
49 U.S.C. §§20301-20306	14
49 U.S.C. §§20701-20703	9
49 U.S.C. §20701(1)	9
49 U.S.C. §21302(a)(1)	25, 26
49 C.F.R. §229.5	8
49 C.F.R. §229.7(b)	25
49 C.F.R. Part 231	15

OTHER AUTHORITIES

18 Am. Jur. 2d *Contribution* (1985)	29
41 Am. Jur. *Indemnity* (1985)	29
Association of American Railroads, *Railroad Facts* (2010 ed.)	7, 9
Federal Railroad Administration, Passenger Equipment Standards; Front End Strength of Cab Cars and Multiple-Unit Locomotives, 75 FED. REG. 1180 (Jan. 8, 2010)	20
Hearings on S.811 *Before the Senate Committee on Interstate Commerce*, 52nd Cong., 1st Sess. (1892)	3
H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N.	15, 16, 17
John H. Armstrong, THE RAILROAD - WHAT IT IS, WHAT IT DOES (1978)	9
S. Rep. No. 661 (1939)	23

IN THE

Supreme Court of the United States

No. 10-879

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, WIDOW IN HER OWN RIGHT
Petitioner,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads,

[1] The parties have filed letters with the Court consenting to the filing of *amicus* briefs. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

many smaller railroads, Amtrak, and several commuter railroads. AAR's members operate approximately 76 percent of the rail industry's line haul mileage, produce 96 percent of its freight revenues, and employ 93 percent of rail employees. AAR frequently appears before Congress, administrative agencies and the courts on behalf of its members on matters of significant interest to the railroad industry. One such matter is the interplay between state law and the comprehensive federal regulatory scheme governing railroad safety, the subject of the decision below.

Although none of the parties in this case are railroads—the former railroad employer of petitioners' decedent was named as a defendant but subsequently granted summary judgment on grounds that are not before this Court—this case nonetheless presents an issue of vital importance to the nation's railroads.[2] In the decision below, the Third Circuit held that the Locomotive Inspection Act (LIA) preempted the plaintiff's state law product liability claims against respondents, companies that had manufactured locomotives and/or component parts of locomotives with which the plaintiff worked while employed at a railroad. AAR is filing this brief because the outcome of this case, and the manner in which this Court construes the preemptive effect of the LIA, will have

---

[2] This case arises out of a lawsuit brought by a former railroad employee (who has since passed away) against several parties, including respondent manufacturers, under state law, and against his former railroad employer under the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 *et seq*. The FELA claim was dismissed because the court found there was no evidence of railroad negligence. *Kurns v. Airco Welders Supply, Inc., et al.*, No. 1746 EDA 2008 (Pa. Super. Ct. 2008).

a substantial impact on railroads throughout the nation.

Application of the doctrine of federal preemption is of tremendous interest to AAR and its members because of the long history of comprehensive federal regulation of railroad safety. Beginning with the 1892 appearance of a representative of an AAR predecessor organization at congressional hearings on the original Safety Appliance Act (SAA) (the first federal railroad safety legislation),[3] AAR has had long-standing involvement with the subject of rail safety, frequently representing its members in proceedings before legislative and regulatory bodies. AAR continues to participate in all significant railroad safety rulemaking proceedings conducted by the Federal Railroad Administration (FRA), the agency now responsible for implementing and enforcing federal railroad safety laws. Those laws, which constitute a comprehensive scheme of railroad safety regulation, have the dual, and related, goals of advancing safety and ensuring nationally uniform regulation. Preemption of state laws related to rail safety is an essential component of the federal safety statutes because it removes potential impediments to the effective implementation of the federal scheme.

In addition to its involvement with rail safety in the legislative and regulatory arenas, AAR frequently participates as *amicus curiae*, on behalf of its members, in significant cases that implicate the interplay between the federal regulatory scheme and state law. *E.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658

---

[3] *Hearings on S.811 Before the Senate Committee on Interstate Commerce*, 52nd Cong., 1st Sess. (1892) (testimony of H.S. Haines, Vice President of the American Railway Association).

(1993) (preemption of state law with respect to duties to select and install grade crossing warning devices, and train speed); *Norfolk Southern Ry. v. Shanklin*, 529 U.S. 344 (2000) (crossing warning devices); *Burlington Northern Santa Fe Ry., et al. v. Doyle*, 186 F.3d 790 (7th Cir. 1999) (minimum train crew requirements); *CSX Transp., Inc. v. City of Plymouth, Michigan*, 92 F.Supp.2d 643 (E.D. Mich 2000), *aff'd*, 283 F.3d 812 (6th Cir. 2002) (train length and speed); *Carrillo v. ACF Industries, Inc.*, 980 P.2d 386 (1999) (safety appliances on covered hopper cars). Establishing preemption in those cases was essential because application of state law would have undermined the national uniformity of railroad safety regulation which Congress has determined is critical to effective railroad regulation.

National uniformity is implicated in this case too, specifically with regard to the twenty-four thousand locomotives currently in service on the rail network. Preemption of state law under the LIA, which is at issue here, assures that AAR members will be able to rely on a single source of regulation of their locomotives. As the parties that are most directly affected by rail safety regulation in general, and locomotive regulation in particular, AAR member railroads have a strong interest in the outcome of this case.

STATEMENT OF THE CASE

AAR adopts the Factual Background and Procedural History of the case set forth in respondents' brief.

SUMMARY OF THE ARGUMENT

This Court should affirm the Third Circuit's decision which held that petitioners' state law claims related to locomotive design is preempted by the LIA.

Congress has delegated authority to the Secretary of Transportation to regulate all aspects of locomotive design, construction and materials, occupying that field, and thereby preempting all state efforts to regulate in that area. LIA preemption of state law applies regardless of whether a locomotive is operating on a railroad's line or temporarily in a shop for repair. It would be untenable to hold that while states are preempted from regulating locomotives while in use, they are free to regulate the design of the very same locomotives when in a shop.

Congress expanded the Secretary's authority over rail safety under the Federal Railroad Safety Act (FRSA), but in doing so did not limit the broad LIA preemption recognized by this Court in *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926). Moreover, LIA preemption applies to state tort claims as well as state legislation and regulation. Both avenues of state regulation have the impact of establishing standards for the design of locomotives, and thus undermine the plenary authority of the Secretary to regulate locomotives.

Notwithstanding the Third Circuit's suggestion to the contrary, preemption of respondents' state law claims is not dependent on whether a plaintiff has a remedy under FELA. Both railroads and manufacturers are responsible for complying with federal standards for locomotives, and both must be insulated from state efforts to impose design and construction standards on locomotives. Additionally, contrary to the assertions made by petitioners and some of their *amici*, preemption of petitioners' claims would not serve to preclude state law contribution or indemnity claims that otherwise might be available to a railroad against a manufacturer of railroad

equipment. Unlike petitioners' claims, contribution or indemnity claims do not seek to impose a state law standard of conduct on manufacturers, but rather seek an allocation of liability between parties that may be liable for violation of a federal safety standard.

ARGUMENT

I. THE LOCOMOTIVE INSPECTION ACT PREEMPTS STATE LAWS THAT SEEK TO IMPOSE DESIGN REQUIREMENTS ON LOCOMOTIVES, INCLUDING STATE LAW-BASED TORT SUITS ALLEGING DESIGN DEFECTS

A. Congress Determined That Railroad Safety Should Be Regulated Comprehensively and Uniformly at the Federal Level and Preempted State Efforts to Regulate Rail Safety

The question in this case is whether the regulation of locomotive design is an exclusive federal matter or is instead subject to the *ad hoc* determinations of juries applying the varying laws of fifty states. Although this case involves a state law claim against manufacturers of locomotives and locomotive components, rather than a railroad, its resolution will directly affect the nation's railroads. National uniformity in the regulation of locomotive design is absolutely essential to the operation of the national rail network. It is therefore important that this Court reaffirm the well-established principle that the LIA occupies the field of locomotive design.

The railroad network, which dates to the first half of the nineteenth century, is an integral (perhaps the

archetypal) instrumentality of interstate commerce.[4] Rail operations are not a discrete activity which may be confined within the boundaries of a single state. Rather, the nation's rail transportation system is an integrated network in which over 560 railroad companies participate, operating over nearly 140,000 miles of track in 49 states.[5] Over 1.3 million freight cars, powered by more than 24,000 locomotives, operate on, and are interchanged throughout, this system.[6] Given these characteristics, "the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system." *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 688 (1982).

The fundamental importance of uniformity to the federal scheme of rail safety regulation was properly recognized by the Third Circuit in holding that the LIA preempts plaintiffs' state law claims. The Court reasoned that the "goal of the LIA is to 'prevent the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them.'" *Kurns v. A.W. Chestertion, Inc.*, 620 F.3d 392, 398 (3d Cir. 2010). The Court further explained that "[i]f each state had its own standards for liability for railroad manufacturers, equipment would have to be designed so that it could be changed to fit these standards as the trains crossed state lines, or adhere to the standard of the most restrictive states." *Id.* This potential

---

[4] In addition to covering all lower 48 states, the U.S. rail system links up with the major railroads of Canada and Mexico.

[5] Association of American Railroads, *Railroad Facts* 3 (2010 ed.).

[6] *Id.* at 49, 51. About one-third of rail traffic moves in interchange service, *i.e.*, on more than one line-haul railroad.

impediment to interstate commerce was recognized long ago by Congress when it began to put in place a regulatory structure aimed at effectively promoting railroad safety.

As the integrated and interdependent nature of the rail industry became apparent at the end of the nineteenth century, Congress initiated a policy that ultimately led to comprehensive regulation of the industry by the federal government. Initially, Congress targeted specific aspects of rail safety, leaving other aspects to the respective states. Eventually reaching the conclusion that continued partial reliance on state regulation in some areas was ineffective and counterproductive, Congress expanded the scope of federal regulation of railroad safety, opting for a regulatory regime premised on the legislative finding that a comprehensive, uniform, national approach to rail safety would be most effective. Today, "[r]ailroad law is unique in the breadth, degree, and comprehensiveness of federal oversight and involvement." *In re West Virginia Asbestos Litigation*, 592 S.E.2d 818, 820 (W. Va. 2003).

B. As a Component of the Comprehensive Scheme of Rail Safety Regulation the LIA Vests Authority to Regulate Locomotive Design Exclusively With the Federal Regulator Regardless of the Location of the Locomotive

This case involves the regulation of locomotives, an integral part of any railroad. Locomotives provide the power to operate trains and have served that function since the earliest days of the railroad industry (*See* 49 C.F.R. §229.5 for a definition of locomotive.) Although the source of the power has changed—between 1947 and 1955 the locomotive fleet went

from majority steam powered to majority diesel-electric powered—the basic concept of a power unit pulling freight cars has remained the same. *Railroad Facts* at 49; *see generally* JOHN H. ARMSTRONG, THE RAILROAD – WHAT IT IS, WHAT IT DOES 45-69 (1978). Every one of the hundreds of trains that move across the country each day is powered by one or more locomotives. This essential component of the railroad industry has been the subject of federal regulation for a century.

First enacted as the Boiler Inspection Act, c. 103, 36 Stat. 913 (1911) (and now codified at 49 U.S.C. §§20701-20703), the LIA initially was limited to locomotive boilers. Congress soon expanded the law's scope to cover all aspects of locomotive safety, delegating authority to the Interstate Commerce Commission (ICC) to prescribe regulations covering "every part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611.[7] The LIA imposes obligations on railroads, specifically prohibiting use of a locomotive unless the locomotive and its parts and appurtenances "are in proper condition and safe to operate without unnecessary danger of personal injury," 49 U.S.C. §20701(1), and gives rise to an absolute duty to maintain locomotives in a safe and proper condition. *Southern Ry. Co. v. Lunsford*, 297 U.S. 398, 401 (1936). Violation of the LIA may result from either a failure to comply with an FRA

---

[7] Originally, the ICC, which is responsible for the economic regulation of the rail industry, also was granted authority for implementing the railroad safety laws enacted by Congress. When the Department of Transportation was established, authority over safety was transferred to the FRA, an agency within DOT. Department of Transportation Act, Pub. L. No. 89-670, §6(e), 80 Stat. 931 (1966).

regulation related to locomotives or failure to keep a locomotive's parts and appurtenances in proper condition and safe to operate. *McGinn v. Burlington Northern R.R.*, 102 F.3d 295, 299 (7th Cir. 1996); *Mosco v. Balt. & Ohio R.R.*, 817 F.2d 1088, 1091 (4th Cir. 1987). Though federal authority over locomotives is plenary, the absolute obligations imposed by the LIA apply only to locomotives that are "in use." *Brady v. Term. R.R. Ass'n*, 303 U.S. 10, 13 (1938); *Crockett v. Long Island R.R.*, 65 F.3d 274, 277 (2d Cir. 1995); *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980); *Lyle v. Atchison, Topeka & San Francisco Ry. Co.*, 177 F.2d 221, 222 (7th Cir. 1949).

Recognizing Congress' intent to comprehensively regulate locomotives at the national level, this Court has long held that the LIA preempts state regulation of locomotives. Thus, in *Napier*, this Court struck down two states' laws which would have required the installation of certain equipment on locomotives. Acknowledging that the "intention of Congress to exclude states from exercising their police power must be clearly manifested," this Court held that the LIA occupies the field with regard to "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." 272 U.S. at 611. (Congress has occupied a field when "the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*. 458 U.S. 141, 153 (1982).) Because Congress had delegated to the ICC a "general" power to set "standards" for locomotives, the LIA preempts state efforts to regulate locomotives regardless of whether the state standard conflicts with the LIA or whether federal

regulators have addressed the specific area covered by the state standard. *Id.* at 613. Several years after *Napier*, this Court reaffirmed the ICC's broad authority over locomotives. *United States v. Baltimore & Ohio R.R.*, 293 U.S. 454 (1935).

Following *Napier*, lower courts consistently have held that attempts by states, through either common law or enactment of positive law, to impose requirements for equipping locomotives are preempted. *E.g., Ogelsby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458, 461 (2nd Cir. 1999) (Allowing states to regulate instructional labels on locomotives would "undermine the goal of the BIA, which is to prevent 'the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them.' [citation omitted]."); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983) (preempting negligence suit alleging that the locomotive should have been equipped with strobe and oscillating lights); *see also In re Amtrak "Sunset Limited" Train Crash in Bayou Canot*, 188 F.Supp.2d 1341, 1347 (S.D. Ala. 2000) ("The claims against Amtrak concerning the Sunset Limited locomotives are preempted by the" LIA.); *Springston v. Consolidated Rail Corp.*, 863 F.Supp. 535, 541 (N.D. Ohio 1994), *aff'd*, 130 F.3d 241 (6th Cir. 1997) ("It is clear that Congress intended to provide a nationally uniform standard of regulating locomotive equipment. If each state is permitted to make its own decisions with respect to such items as reflective materials, oscillating, strobe and ditch lights, such goal would be compromised."); *In Re Train Collision at Gary, Ind. on January 18, 1993*, 670 N.E.2d 902, 911 (Ind. App. 1996) ("claims regarding alleged defects in the design and structure of the train cars are preempted by the" LIA); *Consolidated*

Rail Corp. v. Penn. Pub. Util. Com'n, 536 F.Supp. 653 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3rd Cir. 1982), *aff'd*, 461 U.S. 981 (1983) (preempting state statute requiring speed recorders and indicators on locomotives); *Gen. Motors Corp. v. Kilgore*, 853 So.2d 171, 178 (Ala. 2002) ("Because . . . the [LIA] occupies the entire field, there is no area within which the states may regulate."). These decisions are grounded in the principle that preemption of state regulation "is necessary to maintain uniformity of railroad operating standards across state lines." *Law v. General Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997). In a succinct summary of the key issue presented when states attempt to regulate locomotives, the Court in *Law* explained that "[i]f each state were to adopt different liability-triggering standards . . . Congress's goal of uniform, federal railroad regulation would be undermined." *Id.* at 910-11.

Petitioners' attempt to distinguish *Napier* and the numerous other cases that hold the LIA preempts state law by arguing that the LIA's preemptive effect does not apply to the claims in this case because the ICC (and now FRA) did not have authority to regulate the locomotive "repair process." Pet. Br. 23, 35; *see also id.* 42 (ICC "not authorized . . . to issue any regulations governing the safety of railroad repair and maintenance."). But, fairly construed, petitioners' claims challenge the adequacy of the design and construction of locomotives, not the repair process. Were respondents held liable, it would effectively impose state-law requirements with respect to "the design, the construction, and the material" of locomotives (*Napier*, 272 U.S. at 611), and thereby invade the field occupied—and thus preempted by—the LIA.

Petitioners' attempt to limit the LIA's preemptive effect to circumstances in which a locomotive is "in use" creates an untenable situation. Locomotive design is indivisible; it does not vary depending on whether the locomotive is in use or temporarily in a repair shop. Locomotives are anything but stationary, and they spend most of their lives moving over rail lines throughout the nation. All large and moderate sized railroads operate across multiple state lines. Moreover, during those operations, locomotives are routinely interchanged among railroads; consequently, just like freight cars, locomotives used by a railroad may move off that railroad's line onto other railroads' systems. *See United States v. Allegheny Ludlam Steel Corp.*, 406 U.S. 742, 743 (1972). Under these circumstances, if individual states were permitted to impose requirements on locomotives (or rail cars, for that matter) when they happen to be in a shop, railroads that operate daily in interstate commerce would soon be subject to varying and potentially conflicting regulations, creating a huge burden on commerce, potentially even requiring changing equipment as trains cross state borders.[8] As the court pointed out in *Seaman v. A.P. Green Ind., Inc.*, 707 N.Y.S. 2d 299, 302 (N.Y. S. Ct. 2000), "[a] locomotive's design, construction, parts and materials,

---

[8] This Court recognized the danger of varying state standards, holding that an Arizona law regulating the length of trains violated the Commerce Clause because it would "inevitably result in an impairment of uniformity of efficient railroad operation because . . . [c]ompliance with a state statute limiting train lengths requires interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state . . .". *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 773 (1945).

which are regulated by the BIA, are the same whether or not the locomotive is in use."

The Secretary of Transportation's plenary authority to prescribe regulations for locomotives—the basis for preemption—applies to locomotives at all times. The *Napier* holding must be read this way to effectuate Congress' determination that the federal government alone has the authority to regulate locomotives. Clearly, uniformity in the regulation of railroad equipment, preserved by federal preemption, is critical to rail operations because it avoids the need to conform to potentially varying state requirements for locomotives and other railroad equipment, and instead, permits railroads to look to and rely upon federal standards. To grant the federal government exclusive authority over the design of locomotives while they are operated on a railroad's line, while permitting state design standards to apply while the same locomotives are being maintained in a shop, undermines the regulatory scheme Congress chose to implement for locomotives. With respect to locomotives, contrary to petitioners' assertions, that scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Pet. Br. 32.

C. The LIA is Part of a Scheme of Federal Railroad Safety Laws That Are Premised On the Importance of Maintaining Uniformity of Rail Equipment and Safety Regulation

The LIA is but one prong of the comprehensive federal regulation of rail safety that began at the end of the nineteenth century with enactment of the SAA, c. 196, 27 Stat. 531 (1893) (codified today at 49 U.S.C. §§20301-20306). Initially limited to requiring that

rail cars be equipped with automatic couplers, Congress amended the SAA in 1910 to establish additional uniform national standards for "safety appliances" on railroad cars. Act of April 14, 1910, c. 160, 36 Stat. 298. The 1910 Act directed the ICC to issue safety appliance standards, a directive implemented by an ICC order of October 13, 1910. *See* 49 C.F.R. Part 231 (containing regulations implementing the SAA). The regulations promulgated under the SAA preempt state law requiring "greater or less or different equipment." *Southern R.R. v. Railroad Comm'n*, 236 U.S. 439, 446 (1915); *Carrillo*, 980 P.2d at 389-90 ("Since Congress 'has so far occupied the field the categories of safety appliances created by [the SAA] . . . should be broadly read to include every device falling within that category, even if the Secretary of Transportation has not seen fit to standardize a particular type or use of that device.") (citations omitted)

In 1970, Congress greatly expanded the already extensive and longstanding federal regulation of railroad safety. Despite finding that the existing federal laws, which focused on regulating discrete areas of rail safety, were "reasonably effective in their respective areas," H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. at 4106, Congress determined that there was nonetheless a pressing need for a more uniform and comprehensive approach to regulating rail safety. Therefore, Congress enacted FRSA, Pub. L. No. 91-458, 84 Stat. 971 (1970), with the purpose of "promot[ing] safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents." 45 U.S.C. §421 (now codified at 49 U.S.C. §20101). *See Doyle*, 186 F.3d at 794 (Congress passed FRSA "[i]n response to the perceived need for comprehensive rail safety regula-

tion."). Explaining its decision greatly to expand the federal role in rail safety, Congress noted that the railroad industry "has very few local characteristics," but rather

> has a truly interstate character calling for a uniform body of regulation and enforcement. * * * To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. Report No. 91-1194, *reprinted in* 1970 U.S.C.C.A.N. at 4110-11. FRSA represents the culmination of Congress' approach to regulating rail safety, which is guided by the determination that in order to achieve a safe, efficient, and competitive national rail network, uniformity with regard to operations must be maintained. *Michigan Southern R.R. v. City of Kendallville, Ind.*, 251 F.3d 1152, 1155 (7th Cir. 2001) ("Congress' occupation of the field of railroad regulation is to ensure uniform national standards.").

FRSA expanded the role of the federal government in the regulation of rail safety; it did not contract the Secretary's long-recognized authority over locomotives. Thus, the Third Circuit correctly concluded that FRSA, which "supplemented" existing railroad safety laws, did not narrow the preemptive scope of the LIA, which continues to occupy the field with respect to the regulation of locomotives. 620 F.3d at 400-01.[9] FRSA granted authority to regulate all

---

[9] In the petition for certiorari, petitioners asserted that FRSA had superseded any preemptive authority of the LIA. However, petitioners' merits brief does not seem to pursue that argument directly, though at least one of their *amici* does. Br. for *Amicus*

areas of rail safety, expanding the Secretary of Transportation's authority well beyond the specific areas already regulated by the federal government under previously enacted safety laws. To the extent states had regulated within the areas covered by the Secretary's expanded authority, those regulations were permitted to remain in effect until the Secretary had issued regulations covering those areas. At the same time, Congress made it clear that FRSA was not meant to "replace the existing rail safety statutes and implementing regulations," and that those laws were to "continue to be enforced and administered by the Department [of Transportation] in their respective areas . . . as if [FRSA] had not been enacted." H.R. Rep. 91-1194, at 16.

Thus, FRSA may not be read to permit states to expand their authority over rail safety into areas where they had previously been prohibited from regulating. As the court held in *Consolidated Rail Corp.*, 536 F.Supp. at 656-57, a decision affirmed by this Court, neither FRSA's purpose nor its legislative history suggests that Congress intended to overrule *Napier* and permit states to reoccupy the field of locomotive safety by regulating locomotive construction and design until FRA issues a regulation covering the same subject. Interpreting FRSA as having reduced the scope of LIA preemption "would undermine achievement of one of the explicit purposes of the Railroad Safety Act—national uniformity of railroad

---

Curiae National Association of Retired and Veteran Railway Employees. There is no merit to that assertion. *See Springston*, 130 F.3d at 245 ("the preemptive effect of the BIA on state regulation of locomotive equipment was not affected or modified by the Federal Railroad Safety Act."). The United States agrees. Br. for the United States as *Amicus Curiae* 21, n.9.

regulation." *Marshall*, 720 F.2d at 1153. As the Third Circuit correctly held, locomotives, which continually cross state boundaries, remain subject to exclusive federal regulation in all respects.

D. The LIA's Occupation of the Field of Locomotive Safety Preempts State Tort Actions

Petitioners suggest that *Napier* might be read as applying LIA field preemption of "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances" to state legislation but not to common law personal injury claims. Pet. Br. 32, 38.[10] This is incorrect. For the purpose of preemption under the federal railroad safety statutes there is no meaningful distinction, as either form of regulation can have a similarly disruptive effect on the federal regulatory scheme. *See Riegel v. Medtronic, Inc.* 552 U.S. 312, 323-24 (2008); *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 881 (2000).[11]

Surely it would defeat the purpose of preemption to hold that a state legislature is prohibited from requiring a certain device on a locomotive but that a jury hearing a state law tort claim may find a defendant negligent for having failing to install the very same device. Inherent in the adjudication of a negligence action is a jury's determination of the proper standard of conduct to which the defendant should have

---

[10] Some of petitioners' *amici* argue that LIA preemption does not apply to common law claims. *See Amicus Curiae* Br. of the American Association for Justice (AAJ); Br. of *Amicus Curiae* Public Justice, P.C.

[11] This Court held that preemption of state law under FRSA applies to "[l]egal duties imposed on railroads by the common law." *Easterwood*, 507 U.S. at 664.

adhered, *i.e.*, whether a duty was owed and, if so, whether due care was exercised in carrying it out. Damages assessed through findings of negligence under state tort law, no less than prescriptive regulations enacted by a state legislature, constitute the imposition of a state standard of conduct, a result inherently at odds with the federal regulatory scheme. As this Court explained in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959), "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusively federal regulatory scheme."

This Court has consistently recognized the functional similarities of prescriptive legislative enactments and common law tort suits. Addressing the scope of preemption under the Federal Cigarette Labeling and Advertising Act in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992), this Court found "no distinction between positive enactments and common law," citing to *Garmon*'s characterization of the regulatory effects of common law claims as support for that conclusion.[12] Similarly, in *Geier*, 529 U.S. at 881, this Court characterized a tort action alleging a failure to install airbags in an automobile manufactured by the defendant as "a rule of state tort law imposing [ ] a duty" that "would have required manufacturers of all similar cars to install

---

[12] Contrary to the argument of *Amicus* AAJ, this Court's finding of the equivalence of tort suits and positive law for preemption purposes is not limited to the specific statute or facts at issue in *Garmon*.

airbags rather than other passive restraint systems." The Court explained that permitting such a claim "would have stood 'as an obstacle to the accomplishment and execution'" of important federal objectives. *Id.* (citations omitted)

Lower courts finding preemption under the LIA have utilized similar reasoning. *See Law*, 114 F.3d at 910-12. (The "purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state. * * * Imposing tort liability . . . would transfer the regulatory locus from the Secretary of Transportation to the state courts" a result that is clearly contrary to federal law.); *Scheiding v. General Motors*, 993 P.2d 996, 1003 (Cal. 2000) ("plaintiffs' lawsuits would have a retroactive regulatory effect by now allowing design control the [LIA] denied the state at the time of manufacture"). "To permit a jury to impose upon a railroad the duty to equip its locomotives with purported safety features that the FRA has not seen fit to impose undermines the LIA's goal of national uniformity and the authority of the uniquely qualified FRA to assert its expertise regarding such features." *Dodge v. Union Pac. R.R.*, 2007 WL 1432033, at *3, n.2 (D. Ore. 2007).

Indeed, juries are particularly ill-suited to establish standards in areas where Congress has assigned that role to a federal agency with specific expertise in the subject matter. Unlike an expert agency, which takes into account all relevant information and factors when weighing whether to issue a regulation and the regulation's proper scope, a jury necessarily focuses on a single event, interpreted by expert witnesses paid by the litigants. In *Riegel*, this Court explained that where the federal government has implemented a regulatory regime, permitting juries

to establish a standard of care under state common law can be even more disruptive to the federal scheme than would actions of a state regulatory agency, because, while the regulatory agency presumably weighs the costs and benefits of a proposed regulation, "a jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits." 552 U.S. at 325. *See also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring) ("The effects of the state agency regulation and the state tort suit are identical. To distinguish between them for pre-emption purposes would grant greater power . . . to a single state jury than to state officials acting through state administrative or legislative lawmaking processes.") FRA takes the same position, explaining in a recent rulemaking that in the absence of preemption of tort actions, "the effective railroad safety standard would be set by the most recent jury verdict in each State and national uniformity of safety regulation would no longer exist." Federal Railroad Administration, Passenger Equipment Standards; Front End Strength of Cab Cars and Multiple-Unit Locomotives, 75 FED. REG. 1180, 1210 (Jan. 8, 2010). That is precisely why national policy on rail safety reflects the view that safety standards should be set by "experts in railroad safety to whom Congress has assigned the task" rather than "twelve jurors . . . most of whom probably do not know anything about railroad safety." *Id.*

II. LIA PREEMPTION IS NOT DEPENDENT ON THE AVAILBILITY OF A FELA REMEDY NOR DOES IT FORECLOSE ALL STATE LAW REMEDIES

The Third Circuit correctly held that petitioners' state law tort claims were preempted. But preemp-

tion of petitioners' claims here does not necessarily foreclose relief to plaintiffs who are injured in an accident or incident involving a locomotive. However, as the federal government establishes locomotive safety standards, any remedy must be derived from obligations placed on parties under federal law. On the other hand, notwithstanding the Third Circuit's suggestion in dicta "that federal law offers recourse to workers exposed to asbestos under the" FELA, 620 F.3d at 400, whether a FELA remedy would be available to a plaintiff notwithstanding the LIA is not relevant to the preemption analysis (and not before this Court). Indeed, in this case the plaintiff's FELA claim was dismissed because he could not make the showing of employer negligence that FELA requires.

In 1908, in response to a high casualty rate among rail workers and the perceived inadequacy of the remedies available under the common law of that era, Congress enacted FELA to provide a fault-based remedy to rail employees injured on the job against their employer. FELA plaintiffs must prove all of the elements of a negligence claim, though if violation of a safety statute, like the LIA, causes an injury, the employer is considered negligent as a matter of law. *Urie v. Thompson*, 337 U.S. 163, 189 (1949). And, in such cases the employer loses the defense of comparative negligence which would otherwise be available. 45 U.S.C. §53. Though FELA now provides the exclusive remedy of all railroad employees against their employer for workplace injuries,[13] it does not bar rail

---

[13] Initially, many rail employees did not come within the scope of FELA's coverage because in order to recover, "the employee, at the time of the injury," had to be "engaged in interstate transportation, or in work so closely related to it as to be practically a part of it." *Shanks v. Delaware, Lackwanna &*

employees from suing other parties who may be liable for the injury. Injured non-rail employees may not bring claims under FELA, however, under appropriate circumstances they may have a cause of action against railroads and non-railroads that are responsible for their injuries.

A. The Sole Obligation of Both Railroads and Manufacturers With Respect to Locomotives is to Comply With the Standards Set Forth in and Promulgated Under The LIA and Any Liability Must Be Premised on Those Obligations

As the Court below correctly held, since the federal regulatory authority is the sole source of regulation of locomotives, the LIA forecloses certain causes of action (as do other federal rail safety statutes). Because Congress has occupied the field of "the design, the construction, and the material of every part of the locomotive," *Napier*, 272 U.S. at 611, neither the railroads that operate locomotives, nor companies that manufacture those locomotives, can be liable for failing to equip locomotives with parts or components that have not been prescribed by the FRA, even if those parts or components might be said to enhance safety. *Id.* at 610-11; *Forrester v. Amer. Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001) (dismissing allegation that failure to install an automatic warning

---

Western R.R., 239 U.S. 556, 559 (1916). In 1939, FELA was amended to expand the scope of its coverage so that workers no longer would have to prove they were engaged directly in interstate commerce at the time they were injured. Act of Aug 11, 1939, c. 685, §1, 53 Stat. 1404; *see* S. Rep. No. 661, at 2-3 (1939); *see also Southern Pac. Co. v. Gileo*, 351 U.S. 493 (1956).

system on a locomotive crane constituted a defective design); *Marshall*; *Springston*. Nor, in the absence of a violation of the LIA or an FRA regulation, may they be liable for allegedly having designed a locomotive defectively.

Such claims are precluded because federal law establishes the standard of care. While there is no private right of action under the LIA (or the SAA or FRSA), these safety acts are considered an adjunct to FELA, *Urie*, 337 U.S. at 189, and railroads may be held liable for violations of those statutes in an action brought by a rail employee under FELA.[14] Additionally, it is well established that parties that are not proper plaintiffs under FELA may nonetheless seek

---

[14] On the other hand, in addition to creating obligations with respect to locomotives, the LIA also bounds them. Adopting the reasoning supporting LIA preemption in design defect cases, courts have declined to hold railroads liable under FELA for failing to install components on locomotives that are not required by FRA. In *Norfolk Southern Ry. Co. v. Denson*, 774 So.2d 549 (Ala. 2000), the plaintiffs alleged the railroad was negligent in failing to equip its locomotives with air conditioning. "[O]n the authority of *Napier*," the Alabama Supreme Court held that the railroad had no such duty, reasoning that such a ruling would undermine the "jealously guarded" uniformity "on which various federal policies are grounded." *Id.* at 556. The Court noted that permitting such a claim could result in locomotives operating in Alabama "hav[ing] to be air conditioned, while those operating in neighboring states would not." *Id.* *See also Monheim v. Union R.R.*, ___ F.Supp.2d ___, 2011 WL 1527798 (W.D. Pa. 2011) (rejecting FELA claims that locomotive should have been equipped with an alterter or deadman's switch, and an ejection-proof seat, as precluded by the LIA); *Munns v. CSX Transp. Inc.*, 2009 WL 805133, at *5, n.5 (N.D. Ohio 2009) (rejecting FELA claim, as precluded by the LIA, that seats in locomotive were defective because they were not designed in an ergonomically sound way).

redress for violation of federal rail safety standards through state law remedies. *Fairport, P. & E. R.R v. Meredith*, 292 U.S. 589, 598 (1934) ("The Federal Safety Appliance Act . . . imposes absolute duties upon interstate railway carriers and thereby creates correlative rights in favor of such injured persons as come within its purview; but the right [of a non-railroad employee] to enforce the liability which arises from the breach of duty is derived from principles of the common law."); *Crane v. Cedar Rapids & Iowa City Ry.*, 395 U.S. 164 (1969); *Jacobson v. N.Y., N.H. & H. R.R.*, 206 F.2d 153, 156 (1st Cir. 1953) ("[T]hough Congress has not created a statutory right of action in favor of passengers injured as a result of violation of the Safety Appliance Acts, it is still possible for the courts to do so on principles of the common law."); *Scott v. Chicago, R.I. & Pac. R.R.*, 197 F.2d 259 (8th Cir. 1952) (suit by automobile passenger under Iowa law arising from a grade crossing accident alleging violation of LIA); *Steffey v. Soo Line R.R.*, 498 N.W.2d 304, 308 (Minn. App. 1993) (nonemployee must look to state law for remedy for LIA violation).

Nothing in the federal scheme of rail safety regulation suggests that in providing rail workers a federal remedy against their employer for workplace injuries Congress intended that *only* railroads may be liable in tort for violating federal safety laws. Like railroads, manufacturers may be held responsible for violations of the LIA or other federal rail safety standards. *See* 49 U.S.C. §21302(a)(1); 49 C.F.R. §229.7(b) (Any "person" may be liable for a violation of the LIA, including a locomotive manufacturer.); *Scheiding*, 993 P.2d at 1003. While "[s]tates are precluded from imposing additional duties in the field of locomotive equipment and design" a manufacturer

has a "duty [ ] to comply with federal regulations and standards concerning design, material and construction of locomotive equipment." *Carter v. Consolidated Rail Corp.*, 709 N.E.2d 1235, 1239 (Ohio App. 1998). "Any state law that undermines the national regime is preempted by the LIA," because only federal standards regulate a manufacturer's "conduct in the design and manufacture of its locomotives." *Bell v. Illinois Cent. R.R.*, 236 F.Supp.2d 882, 890-91 (N.D. Ill. 2001). Indeed, respondents acknowledge that the "DOT is [ ] charged with ensuring that manufacturers do not even *build* . . . unsafe locomotives." Br for Resp. 32.

Thus, notwithstanding the ruling below, LIA preemption does not necessarily preclude a remedy against a manufacturer of railroad equipment who may be responsible for an injury. In the context of regulation of locomotives, the purpose of preemption is not to insulate a particular class of defendants from liability for the consequences of their wrongful conduct. Rather, it is premised on ensuring that there will be a single source of regulatory authority with respect to locomotive safety, and requires that a regulated party's conduct be judged under federal substantive law alone. As in this case, preemption under the LIA protects manufacturers from legal liability for failing to adhere to state requirements. However, since manufacturers have an obligation to comply with the LIA (and other federal rail safety laws), 49 U.S.C. §21302(a)(1), they too may be liable for breaching that obligation through a common law action utilizing federal substantive law as the standard of liability. There is an important distinction between a state law claim which seeks to vindicate a party's rights when a federal statute, like the LIA, has been violated, and a state law claim which seeks

to vindicate a right under a state law theory of liability independent of the federal statute. Only the latter is preempted.[15]

Preemption can effectively achieve its goal—assuring uniformity in the regulation of rail safety—only if it avoids distinctions between railroad and non-railroad defendants; as a corollary, the liability of railroads and non-railroads for failing to adhere to applicable federal standards also must be coextensive. Indeed, any other outcome would undermine the principles on which preemption is grounded. Holding railroads responsible for injuries to their employees caused by a violation of a federal safety standard, while applying preemption to insulate from liability equipment manufacturers who may be equally culpable for the violation, does nothing to advance the policy of avoiding non-uniform requirements. "The logic behind field preemption does not support the premise that one defendant would be excused from suit and a different defendant would be open to suit on the same legal theory." *Oglesby v. Del. & Hudson Ry. Co.*, 964 F.Supp. 57, 62, n.3 (N.D. N.Y. 1997), *rev'd on other grounds*, 180 F.3d 458 (2nd Cir. 1999); *See also In re Amtrak "Sunset Limited" Train Crash*, 188 F.Supp.2d at 1349, n.11 (calling it an "oddity" and an "incongruous result" to hold that one group of claims arising under state law related to rail

---

[15] The right to pursue state tort remedies, not confined to railroad defendants, for violations of federal safety standards was confirmed by a 2007 amendment to FRSA which clarified that state law claims "alleging that a party has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation" are not preempted. 49 U.S.C. §20106(b)(1)(A).

car design is preempted while federal claims arising from the same occurrences may go forward).[16]

There can be but one set of requirements with regard to locomotives: those established by the LIA and the regulations promulgated thereunder by the Secretary of Transportation. The Third Circuit correctly held that petitioners' state laws design defect claims are preempted because states may not impose locomotive design standards on manufacturers or railroads, not, as the Court suggested in dicta, because FELA "may be the appropriate avenue of relief" 620 F.3d at 400, even when an analogous state-law claim against a manufacturer is preempted. That point is irrelevant, and not necessarily correct. The only issue presented by this case is whether the LIA preempts a design claim against a locomotive manufacturer; the question of whether and to what extent an analogous design claim against a railroad under FELA is permitted or precluded is not before the Court, and AAR respectfully urges the Court to not repeat the Third Circuit's erroneous dicta.

---

[16] Of course, because the roles and responsibilities of railroads and manufacturers are different—manufacturers construct locomotives, while railroads operate them and are responsible for the workplace environment in which they are used—some legal theories may be available against railroads that would not be viable against manufacturers. For example, most likely only a railroad would be susceptible to an LIA claim alleging failure to maintain a locomotive so as to render it unsafe for use.

B. Preemption of Petitioners' State Law Design Defect Claims Should Not Impact Contribution or Indemnity Claims That Might Otherwise Be Available to Railroads Against Manufacturers

Petitioners assert, though do not explain why, that holding their state law claims to be preempted also would deprive railroads of their right to seek contribution or indemnity from manufacturers that might otherwise be available under state law. Pet. Br. 2, 18, 43. The impact of LIA preemption on state contribution and indemnity claims is not before the Court. However, there is no reason the field preemption under the LIA recognized in *Napier*, and applied by the Third Circuit in this case, would preclude such claims. Unlike state law claims alleging a design defect in a locomotive, a railroad's state law claims for contribution or indemnity against a manufacturer would not impose state law standards of care on a manufacturer, but simply would serve to allocate liability among parties responsible for violation of a federal standard.[17]

---

[17] The doctrine of contribution is based on the principles of equity, and is aimed at arriving at a fair and just division of losses. 18 Am. Jur.2d *Contribution* §1 (1985). It is the right of one who has discharged a common liability to recover from another who also is liable for some portion of the liability borne by the first party. *Id.* Though a claim for indemnity arises from an express or implied contractual relationship, it also is an equitable doctrine which shifts the entire burden of loss from one tortfeasor who has been compelled to pay to another whose act of negligence is the primary cause of the injured party's harm. 41 Am. Jur. *Indemnity* §3 (1985). Like contribution, indemnity is designed to avoid the unfairness of one party bearing a loss where another party is at fault.

It is not uncommon for third parties potentially to bear responsibility for an injury to a rail employee. Railroads frequently use equipment that is owned and/or manufactured by other parties. Similarly, some railroad operations may take place in facilities which the railroad does not own. Thus, rail employees may be exposed to hazards resulting from a third party's conduct over which the railroad has little control. Nonetheless, federal law imposes on railroads a duty to exercise ordinary care to provide a reasonably safe workplace. *Bailey v. Cent. Vermont Ry.*, 319 U.S. 350, 352-53 (1943).

However, "[a]n employer's non-delegable duties under FELA should not deprive the employee of recovery from other parties, or the employer of the ability to seek indemnification from third parties." *Stephens v. Southern Pac. Transp.Co.*, 991 F.Supp. 618, 620 (S.D. Tex. 1998). This Court has recognized that railroads have a right to seek contribution or indemnity on an underlying FELA claim under otherwise applicable state or federal law. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 162 (2003). Indeed, *Ayers* suggests that the right to bring such actions serves to mitigate the unfairness of its holding that denied railroads the ability to seek apportionment of damages under FELA.

Many other courts have recognized railroad's state law contribution and indemnity rights. *Ayers*, 538 U.S. at 162, n.21. In *Ellison v. Shell Oil Co.*, 882 F.2d 349 (9th Cir. 1989), a railroad employee who was injured on the job filed a FELA action alleging the injury was caused by a violation of the SAA. The railroad defendant brought a state indemnity action against Shell, which owned the car and facility on which the injury occurred. The Ninth Circuit re-

versed a directed verdict for Shell stating that "FELA does not bar railroads from seeking indemnity where state law permits and where another party bears some legal responsibility." 882 F.2d at 353. *See also Burlington Northern R.R. v. Farmers Union Oil Co. of Rolla*, 207 F.3d 526 (8th Cir. 2000) (a railroad's obligations under FELA does not preclude a third party from being held financially responsible to a railroad for the railroad employee's work-related injuries, even where arising from the violation of a federal safety statute); *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3rd Cir. 1987); *Waylander-Peterson Co. v. Great Northern Ry. Co.*, 201 F.2d 408 (8th Cir. 1953). There is no inconsistency between preempting state law design defect claims and permitting a railroad's state contribution or indemnity claims to go forward where the requisites for such claims have been met.[18]

Claims alleging locomotive design defects, as in this case, are preempted against manufacturers, and typically are foreclosed under FELA to the extent they seek to impose design requirements that are not called for by federal regulations.[19] However, where

---

[18] Depending on the facts, differing standards of liability under FELA and state law may result in the railroad bearing liability where the third party does not, *e.g., Cazad v. Cheasapeake & Ohio Ry. Co.*, 622 F.2d 72 (4th Cir. 1980), but that is independent of whether preemption should bar an indemnity or contribution claim where it would otherwise be available.

[19] *King v. Southern Pac. Transp. Co.*, 855 F.2d 1485, 1489 (10th Cir. 1988). *See also Monheim*; *Munns*; *Denson*, note 14 *supra*. Analogously, where a FELA claim would be preempted under FRSA if brought under state law, courts have held the claim is precluded under the same rationale that supports preemption of related state law claims. *E.g., Waymire v. Norfolk and Western Ry. Co.*, 218 F.3d 773 (7th Cir. 2000); *Lane v. R.J.*

an LIA violation is alleged, or a manufacturer's wrongful conduct gives rise to liability under FELA, contribution or indemnity (if available under applicable state law) are appropriate and should not be foreclosed under any theory of preemption. In *Engval v. Soo Line R.R.*, 632 N.W.2d 560 (Minn. 2001), a rail employee injured by a defective part in a locomotive brought a FELA action against his employer alleging a violation of the LIA. The railroad argued that the defect was the result of a design flaw in a locomotive component and brought third party state law contribution and indemnity actions against the locomotive manufacturer, alleging the manufacturer was responsible for the LIA violation. Rejecting the manufacturer's argument that the railroad's contribution and indemnity actions were preempted, the Minnesota Supreme Court held that the contribution and indemnity claims "do not rely on any substantive state law standard, but instead rely on the standard imposed by the LIA." 632 N.W.2d at 570. Claims for contribution and indemnity do not implicate uniformity of federal regulation of locomotives because a finding in favor of a railroad would have no impact whatsoever on the federal scheme of regulating the equipping of locomotives, since "the applicable standard, as always, is the standard imposed by the LIA." *Id.* at 567. Rather than an attempt to impose state regulation on the design of locomotives, contribution and

---

Simms, 241 F.3d 439 (5th Cir. 2001); *Nickels v. Grand Trunk Western R.R.*, 560 F.3d 426 (6th Cir. 2009); *Norris v. Cent. of Georgia R.R.*, 635 S.E.2d 179 (Ga. App. 2006). As the Court in *Lane* explained, the uniformity of rail safety regulation Congress intended "can be achieved only if [federal railroad safety] regulations . . . are applied similarly to a FELA plaintiff's negligence claim and a non-railroad employee plaintiff's state law negligence claim." 241 F.3d at 443.

indemnity claims simply seek an equitable result as between two putative tortfeasors. Thus, the *Engval* court properly recognized that, consistent with the policy underlying federal preemption, the liability of railroads and manufacturers is coextensive: neither may be liable for failing to comply with state law standards regarding the design, construction or material of locomotives, but both may be liable for violations of the LIA.[20]

Contrary to petitioners' assertion, railroad contribution and indemnity claims under applicable state law are not incompatible with the Third Circuit's holding.

---

[20] *But see Union Pac. R.R. v. Motive Equip., Inc.*, 714 N.W.2d 232 (Wisc. App. 2006), in which a railroad that had been sued under FELA by an employee injured when a refrigerator in one of its locomotives caught fire brought an indemnity claim against the manufacturer that improperly installed the refrigerator. The court held that the railroad's indemnity claim was preempted by the LIA. The court's rigid, and erroneous, application of preemption failed to appreciate that the indemnity claim would not upset uniformity because it would require nothing of the manufacturer that was not required of the railroad itself, and would not hold the manufacturer to any standard in manufacturing its locomotives to which the railroad which operated the locomotive also is not held.

CONCLUSION

For the reasons set forth above, the holding of the Court of Appeals should be affirmed.

Respectfully submitted,

LOUIS P. WARCHOT
DANIEL SAPHIRE *
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, S.W.
Washington, D.C. 20024
(202) 639-2505
DSaphire@aar.org

* Counsel of Record

Counsel for Amicus

October 7, 2011

AMICUS CURIAE BRIEF

No. 10-879

In the Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, WIDOW IN HER OWN RIGHT,
PETITIONERS

v.

RAILROAD FRICTION PRODUCTS CORP. AND VIAD CORP.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ROBIN S. CONRAD
KATHRYN COMERFORD TODD
SHELDON GILBERT
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

*GENE C. SCHAERR
STEFFEN R. JOHNSON
JACOB R. LOSHIN
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000
gschaerr@winston.com

LINDA T. COBERLY
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-6600

*COUNSEL OF RECORD

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Whether the Locomotive Inspection Act, 49 U.S.C. § 20701 *et seq.* (2006), preempts state-law tort claims concerning the design, construction, or material of locomotives or their parts and appurtenances, as this Court held in *Napier* v. *Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE* 1

STATEMENT 3

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. This Court's Decision In *Napier* Remains Good Law And Should Not Be Overruled. 7

A. Petitioners mischaracterize the historical context from which *Napier* emerged. 8

B. *Napier* is fully consistent with the Court's "contemporary" preemption jurisprudence. 12

C. *Stare decisis* strongly disfavors abandoning *Napier*'s statutory interpretation. 15

II. *Amici's* Attempt To Create A Special Presumption Against Preemption Of Tort Lawsuits Should Be Rejected. 19

A. By its terms, this Court's preemption doctrine applies with equal force to common-law tort claims 19

B. Tort lawsuits are even more likely than state legislation to interfere with the LIA's goal of uniform railroad equipment regulation. 23

C. A special presumption against preemption would contravene the language and purpose of the Supremacy and Commerce Clauses 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

Baltimore & Ohio Railway. Co. v. Jackson, 353 U.S. 325 (1957) 18

Bates v. Dow Agrosciences, LLC, 544 U.S. 431 (2005) 22, 23, 25

Bragdon v. Abbott, 524 U. S. 624 (1998) 17

California v. Federal Energy Regulatory Commission, 495 U.S. 490 (1990) 17, 18

Cannon v. *University of Chicago*, 441 U. S. 677 (1979) 17

Cooley v. Board of Wardens, 53 U.S. 299 (1851) 10

CSX Transportation, Inc. v. McBride, 131 S. Ct. 2630 (2011) 26

Darby v. A-Best Products Co., 811 N.E. 2d 1117 (Ohio 2004) 19

English v. General Electric Co., 496 U.S. 72 (1990) 13, 14

Flood v. Kuhn, 407 U.S. 258 (1972) 16

Forrester v. American Dieselelectric, Inc., 255 F.3d 1205 (9th Cir. 2001) 18

Geier v. American Honda Motor Co., 529 U.S. 861 (2000) 20, 21

General Motors Corp. v. Kilgore, 853 So. 2d 171 (Ala. 2002) 19

Gibbons v. Ogden,
22 U.S. 82 (1824) 8

Hilton v. South Carolina Public Railways Commission, 502 U.S. 197 (1991) 16, 18

In re West Virginia. Asbestos Litigation,
592 S.E. 2d 818 (W. Va. 2003)..... 18

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 16

Law v. General Motors Corp.,
114 F.3d 908 (9th Cir. 1997) 18, 24

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 11

Merrill Lynch v. Dabit,
547 U.S. 71 (2006) 17

Mickelson v. Montana Rail Link, Inc.,
999 P.2d 985 (Cal. 2000) 19

Napier v. Atlantic Coast Line Railroad Co.,
272 U.S. 605 (1926) ..... *passim*

Oglesby v. Delaware & Hudson Railway Co.,
180 F.3d 458 (2d Cir. 1999)..... 19

PLIVA, Inc. v. Mensing,
131 S. Ct. 2567 (2011) 13, 14

Reid v. Colorado,
187 U.S. 137 (1902) 10, 11, 12

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 11, 13, 18

San Diego Building Trades Council v. Garmon,
359 U.S. 236 (1959) 20, 21

Savage v. Jones,
225 U.S. 501 (1912) 11, 12

Silkwood v. Kerr-McGee Corp.,
464 U.S. 251 (1984) 21

Sinnot v. Davenport,
63 U.S. 227 (1859) 8, 9

Sprietsma v. Mercury Marine,
537 US 63 (2002) 22

Springston v. Consol. Rail Corp.,
130 F.3d 241 (6th Cir. 1997) 19

United States v. Locke,
529 U.S. 89 (2000) 13

United Transportation Union v. Foster,
205 F.3d 851 (5th Cir. 2000) 18

Urie v. Thompson,
337 U.S. 163 (1949) 18

Waite v. Dowley,
94 U.S. 527 (1876) 10

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. VI, cl. 2 .....3, 14, 20

STATUTES

36 Stat. 913 (1911) 3

45 U.S.C. § 51 et seq. 25

49 U.S.C. § 20701 et seq. (1994) 4

38 Stat. 1192 (1915) 3

43 Stat. 659 4

Pub. L. No. 91-458, 84 Stat. 971 (1970) 4

Pub. L. No. 103-272, 108 Stat. 745 4

Pub. L. No. 89-670, 80 Stat. 931 (1966) 4

OTHER AUTHORITIES

Caleb Nelson, *Preemption*, 86 Va. L. Rev. 231 (2000) 14

The Federalist No. 7 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 27

The Federalist No. 11 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 27, 28

The Federalist No. 42 (James Madison) (Clinton Rossiter ed., 1961) 26, 27

James Madison, Vices of the Political System of the United States (1787) 27

James Madison, Notes of the Constitutional Convention (May 29, 1787), in 1 The Records of the Federal Convention of 1787 (Max Farrand ed., 1911) 28

Letter from Federal Convention President George Washington to the President of Congress, Transmitting the Constitution (Sept. 17, 1787) 28

Stephen Gardbaum, *The Breadth vs. the Depth of Congress's Commerce Power: The Curious History of Preemption During the Lochner Era*, in Richard A. Epstein & Michael S. Greve, Federal Preemption 48-78 (2007) 9, 10, 11, 12

Viet D. Dinh, *Federal Displacement of State Law: The Nineteenth-Century View*, in Richard A. Epstein & Michael S. Greve, Federal Preemption 27-40 (2007) 11

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

For 85 years since this Court's ruling in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926), it has been settled law that Congress preempted the field of locomotive equipment safety and that state tort lawsuits against equipment manufacturers are not exempted from an otherwise preempted field. Although Respondents have cogently explained why *Napier* squarely resolves this case, we explain here why the Court should neither overrule *Napier* nor weaken the Court's longstanding field preemption precedent through a special presumption against preemption of state tort suits.

Amicus, the Chamber of Commerce of the United States of America, is uniquely positioned to advise the Court on these important issues. The Chamber is the world's largest federation of business, trade, and professional organizations, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and corporations of every size, from every sector, and in every geographic region of the country. Many of the Chamber's members conduct operations in multiple States and have experienced firsthand the burdens that a proliferation of inconsistent state regulations can impose on American businesses. Many of the Cham-

---

* The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus* and its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. See Rule 37.6.

ber's members have also suffered from the cost and uncertainty of out-of-control tort lawsuits that subject businesses to large and unpredictable liability.

The Chamber and its members strongly believe that this Court's longstanding field preemption jurisprudence should be left undisturbed. Although Petitioners and their *amici* suggest that *Napier* should be overruled as "an artifact of an outdated jurisprudential era," their account of *Napier*'s place in history misreads both the history and its supposed artifact. Contrary to Petitioners' suggestion, this Court's early decisions did *not* uniformly treat field preemption as an automatic consequence of federal action. And *Napier*—authored by the chief opponent of that automatic approach—certainly did not do so. To the contrary, *Napier* falls easily within an unbroken line of early decisions that were the very basis for the Court's modern preemption jurisprudence. *Napier* is no artifact, and its longstanding statutory interpretation merits the strongest *stare decisis* respect.

Nor should the Court avoid *Napier*'s consequences by fashioning a special presumption against preemption of state tort lawsuits. Although Petitioners and their *amici* ask the Court to carve out an exception to field preemption for tort lawsuits, there is no basis in law or logic for such an exception—no matter how convenient it may be to the plaintiffs' bar. Tort lawsuits are often the most unpredictable and disruptive form of interference with uniform federal regulation. Absent express statutory language to the contrary, courts should not presume that statutes intended to preempt an entire field were simultaneously intended to stop just short of preempting lawsuits that would subject defendants to divergent tort liability in each of the fifty States. Any such negative presumption is

difficult to reconcile with the text and structure of the Constitution itself. As the Supremacy Clause states, federal law "shall be the supreme law of the land; and the judges in every state shall be bound thereby, *anything in the constitution or laws of any state to the contrary notwithstanding.*" U.S. Const. Art. VI, cl. 2 (emphasis added).

Moreover, recognizing an exception to longstanding principles of field preemption for tort lawsuits would contravene the very purpose of the Supremacy Clause, which was adopted (along with the federal commerce power) to enable the kind of uniform national regulation of interstate commerce embodied in the statute construed in *Napier*. Consistent with the Supremacy Clause, the Court's preemption jurisprudence has ensured that States cannot interfere with a field Congress has sought to regulate uniformly. Those longstanding principles should be reaffirmed here.

STATEMENT

This case arises out of a series of laws enacted in the late nineteenth century to regulate the Nation's interstate railroads. Specifically, Congress created the Interstate Commerce Commission (ICC) and passed various railroad safety measures, culminating in the 1924 amendments to the Boiler Inspection Act, which was later renamed as the Locomotive Inspection Act ("Act" or "LIA"). Unlike prior laws, the LIA gave the Commission broad authority over the safety of "the entire locomotive and tender and all parts and appurtenances thereof." Act of Mar. 4, ch. 169, § 1, 38 Stat. 1192 (1915).

1. The LIA aimed to "promote the safety of employees and travelers upon railroads." 36 Stat. 913

(1911). It sought to accomplish that objective by requiring that locomotives and their parts be "in proper condition and safe to operate," and by empowering the ICC to establish "rules and regulations" for the design and construction of locomotives and their parts. Act of June 7, ch. 355, § 2, 43 Stat. 659. The LIA provided for inspectors to investigate accidents, inspect locomotives, and order repairs. See LIA §§ 3, 6, 8. It also authorized the United States to bring enforcement actions against carriers for any violations of the LIA. See LIA § 9.

Subsequent amendments to the LIA did not materially alter it. See Resp'ts Br. 10-15. In 1965, President Johnson consolidated the functions of the inspectors within the ICC. The following year, Congress transferred the ICC's safety regulatory authority to the Secretary of Transportation. Department of Transportation Act of 1966, Pub. L. No. 89-670, § 6(e)(1)(E), (G), (f)(3)(A), 80 Stat. 931, 939, 940 (1966). In 1970, Congress enacted the Federal Railroad Safety Act (FRSA) to address railroad safety hazards in addition to those involving locomotives and their parts, which were already covered by the LIA. Pub. L. No. 91-458, 84 Stat. 971 (1970). These additional regulations supplemented, but did not repeal or replace, those previously established by the LIA. Finally, in 1994, Congress recodified the railroad safety statutes "without substantive change" to their provisions. Act of July 5, Pub. L. No. 103-272, § 1(a), 108 Stat. 745; 49 U.S.C. § 20701 *et seq.* (1994).

2. Soon after Congress enacted the LIA, this Court construed it and determined its preemptive scope in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926). The opinion was written for a unanimous Court by Justice Brandeis, an ardent *op-*

ponent of the more expansive approach to preemption used by some of his fellow Justices. He explained that the "main question" presented in that case was "one of statutory construction"—"whether the [LIA] has occupied the field of regulating locomotive equipment used on a highway of interstate commerce." *Id.* at 607. Answering that question in the affirmative, the Court found that the text, structure, and purpose of the LIA "clearly manifested" Congress's "intention to occupy the entire field of regulating locomotive equipment." *Id.* at 611.

Because the LIA preempted the entire field of locomotive equipment safety, the Court struck down two state statutes requiring that certain safety equipment be installed on locomotives. Although the state requirements did not directly conflict with ICC regulations, the Court held that the ICC had *exclusive* authority to "prescribe the rules and regulations by which fitness for service shall be determined." *Id.* at 612. As the Court observed, "the power delegated to the Commission * * * extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 611. Thus, "the Commission sets the standard," and "the standard set by the Commission must prevail." *Id.* at 612-613.

3. In 1996, the Department of Transportation completed a congressionally mandated investigation and rulemaking to determine whether asbestos in locomotives and their parts should be regulated. The Department concluded that no regulation was necessary, and that "further action with respect to the presence of asbestos in locomotive cabs" was not "warranted at this time." U.S. Dep't of Transp., Re-

port to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996), at 10-12.

4. In 2007, locomotive repairman George Corson filed a tort lawsuit against his railroad employer and two companies that allegedly manufactured or distributed the locomotives, boilers, and brake shoes Corson had repaired. Although those items were designed and manufactured in compliance with all federal regulatory standards, Corson alleged that they were defective in their design because they contained asbestos. JA20-27. With respect to the manufacturer and distributor, he alleged product defect and failure-to-warn claims under Pennsylvania law.

Finding those tort claims preempted by the LIA, the district court granted summary judgment to the manufacturer and distributor. Pet. App. 25a-34a. Relying on this Court's decision in *Napier* and joining numerous other courts that have addressed the matter, the Third Circuit unanimously affirmed. Pet. App. 10a.

SUMMARY OF ARGUMENT

As we explain below in Part I, the Court's decision in *Napier* remains good law and should not be overruled. Correctly understood, the historical context makes clear that *Napier* is fully consistent with the Court's modern preemption jurisprudence. Further, *stare decisis* strongly disfavors overturning *Napier's* longstanding statutory interpretation.

As we explain in Part II, moreover, *Napier* should not be limited, and the entire field preemption doctrine marginalized, by a novel presumption against preemption of state tort lawsuits. Tort lawsuits are at least as likely as legislation to interfere with a scheme of uniform federal regulation, if not more so.

And such interference would contravene the very purposes for which the Framers crafted the Supremacy and Commerce Clauses.

ARGUMENT

I. This Court's Decision In *Napier* Remains Good Law And Should Not Be Overruled.

In an attempt to diminish *Napier*, Petitioners and their *amici* mischaracterize that decision as "an artifact of an outdated jurisprudential era." Br. of Public Law Scholars as *Amici Curiae* in Support of Pet. ("Scholars Br.") 2. Petitioners coyly suggest that "*Napier* must be understood in its historical context" (Pet. Br. 40) and therefore given little weight, while their *amici* argue directly that "*Napier* [should] be overruled" (Scholars Br. 26).

In so doing, Petitioners and their *amici* attempt to suggest that "[p]reemption doctrine has changed fundamentally since *Napier* in 1926." Scholars Br. 3; see also Pet. Br. 40-41. They argue that the pre-New Deal Court applied a rule whereby *all* federal regulation was thought to "automatically preempt[] the relevant field," and that *Napier* merely "reflects the rule of automatic field preemption that characterized the pre-New Deal period." Scholars Br. 7. Yet after the New Deal, they say, there was a "fundamental change in the law of preemption"—a change that swapped the "automatic preemption" rule for a new focus on congressional intent. *Id.* at 6, 27. The "contemporary approach to preemption," we are told, renders *Napier* an "anachronism." *Id.* at 6, 7.

But there is a problem with this historical account: It is not true. As we explain below, the pre-New Deal period was far from uniform in its approach to preemption. Although some decisions do

appear to have applied a rule of "automatic preemption," others followed what Petitioners now characterize as the "contemporary approach," eschewing such mechanical rules. And while both approaches persisted in separate lines of authority until the New Deal, they culminated *not* in an abrupt paradigm-shift, but rather in the ascendancy of the very "contemporary approach" that had existed all along—in a line of decisions that *included Napier*. Thus, far from being an anachronism, *Napier* was in fact an early example of the "contemporary approach," and it remains fully consistent with this Court's modern preemption jurisprudence.

Because *Napier* cannot fairly be overruled on the ground that it applied an "outdated" preemption analysis, Petitioners' attack on *Napier* amounts to no more than a claim that it misconstrued the LIA. But even if that were true—and it is not—a disputed statutory interpretation is no reason to overrule a nearly century-old decision of this Court. As we explain below, statutory *stare decisis* strongly favors adhering to *Napier*'s interpretation of the LIA. It should not be overruled.

A. Petitioners mischaracterize the historical context from which *Napier* emerged.

The roots of this Court's field preemption doctrine run deep. As early as *Gibbons v. Ogden*, Chief Justice Marshall indicated that state law must yield not only if it is "contrary to" federal law, but also if it would "interfere with" it. 22 U.S. 1, 82 (1824). The latter type of interference was at issue in, among other cases, *Sinnot v. Davenport*, 63 U.S. 227 (1859), where the Court struck down a state law requiring steamboat owners to file a statement of ownership.

The Court found the state law preempted by a federal steamboat licensing statute, even though a steamboat owner could have complied with both state and federal requirements. As the Court explained, the federal statute established "the guards and restraints, and the *only* guards and restraints, which Congress has seen fit to annex to the privileges of ships and vessels engaged in the coasting trade." *Id.* at 241 (emphasis added). Congress, in other words, intended to preempt the field.

Relying on the work of Professor Stephen Gardbaum, however, Petitioners and their *amici* characterize the Court's pre-New Deal preemption doctrine as uniformly applying a rule of "automatic field preemption." Pet. Br. 40; Scholars Br. 6-7. But Gardbaum's own account of the history shows this to be a mischaracterization. The pre-New Deal period in fact saw "two distinct conceptions of preemption." Stephen Gardbaum, *The Breadth vs. the Depth of Congress's Commerce Power: The Curious History of Preemption During the* Lochner *Era*, in RICHARD A. EPSTEIN & MICHAEL S. GREVE, FEDERAL PREEMPTION 48-78, at 56 (2007) ("*Curious History*"). Although one conception indeed "viewed preemption as an automatic, necessary, and inherent consequence of federal action," the other conception "understood preemption as a discretionary power of Congress" that "required a manifestation of congressional intent, express or implied, in the particular federal law." *Id.* at 56-57. Both of these conceptions, moreover, "*existed side by side*, with individual justices generally adhering to one or the other." *Id.* at 56 (emphasis added). Thus, contrary to Petitioners' suggestion, the "automatic conception

never had * * * a total monopoly" in the pre-New Deal period. *Id.* at 57.

The cases bear this out. Far from treating field preemption as an automatic consequence of federal action, multiple early decisions *declined* to find preemption when the Court saw no intent by Congress to occupy the field. *E.g.*, *Cooley v. Bd. of Wardens*, 53 U.S. 299, 321 (1851) ("[A]lthough Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states."); *Waite v. Dowley*, 94 U.S. 527 (1876) (reasoning that state and federal laws could coexist where they had different purposes).

Two of those pre-New Deal decisions were particularly influential. The first—"routinely cited by proponents of the alternative conception" (Gardbaum, *Curious History*, at 62)—was *Reid v. Colorado*, 187 U.S. 137 (1902). There the Court declined to hold that federal law preempted the field of transporting livestock. Far from applying a rule of automatic preemption, the Court in fact strained to avoid preemption, observing: "It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested." *Id.* at 148. And the Court found that "Congress did not inten[d] to override the power of the states" to regulate livestock, despite regulating some of the field. *Ibid.*

In a second case, the Court even more directly repudiated the rule of automatic preemption that Petitioners claim characterized the period: "[T]he

intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact the Congress has seen fit to circumscribe its regulation and to occupy a limited field." *Savage v. Jones*, 225 U.S. 501, 533 (1912).

Thus, when this Court ushered in the so-called "contemporary" era of preemption jurisprudence with its decision in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), it drew on a line of decisions that predated the era. As Professor Gardbaum explains, "*Reid v. Colorado* and *Savage v. Jones* * * * bec[a]me the foundation of the modern, more restrained preemption doctrine." Gardbaum, *Curious History*, at 66; see also Viet D. Dinh, *Federal Displacement of State Law: The Nineteenth-Century View*, in EPSTEIN & GREVE, FEDERAL PREEMPTION 27-40, at 39 (2007) (observing "emergence of modern preemption doctrine" by "the end of the [nineteenth] century"). Although *Rice* extinguished a competing line of decisions employing automatic preemption, *Rice*'s defining feature—a focus on congressional intent—was not new. It is therefore misleading to suggest that "preemption doctrine changed" (Scholars Br. 7) or "evolved" (Pet. Br. 40) after the New Deal in some dramatically new direction. See *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) ("the purpose of Congress is the ultimate touchstone in every pre-emption case" (internal quotation marks omitted)). Rather, it is more accurate to say that the Court "decisively switched from one [already-existing] conception to the other"—both of which had previously "coexist[ed]" in separate decisions. Gardbaum, *Curious History*, at 63.

B. *Napier* is fully consistent with the Court's "contemporary" preemption jurisprudence.

When the historical context is properly understood, *Napier*'s true lineage becomes clear. Far from an "anachronism" (Scholars Br. 7), *Napier* fell squarely within the line of authority that became the Court's "contemporary" approach.

For one thing, *Napier*'s author was Justice Brandeis—a "main *opponent* of automatic preemption" and one of two "major proponents" of the modern approach that later prevailed.[1] Gardbaum, *Curious History*, at 62-63, 64 (emphasis added). Moreover, Justice Brandeis' opinion for the Court relied on *Reid* and *Savage*, the two most significant pre-New Deal decisions *rejecting* automatic preemption. *Napier*, 272 U.S. at 611. And nowhere in his *Napier* decision did Justice Brandeis even cite the competing line of decisions that had typified the automatic-preemption approach. See Gardbaum, *Curious History*, at 57-59.

Justice Brandeis' analysis in *Napier* also makes clear that he relied on no rule of automatic preemption. Instead, consistent with modern preemption jurisprudence, *Napier* asked whether "the legislation of Congress manifest the *intention* to occupy the entire field of regulating locomotive equipment." 272 U.S. at 611 (emphasis added). And upon examining the statute, *Napier* found that Congress did intend to occupy the field by delegating to a federal agency a broad authority to "prescribe the rules and regulations" for "the design, the construction, and the ma-

---

[1] The other was Justice Hughes. See Gardbaum, *Curious History*, at 67.

terial of every part of the locomotive and tender and of all appurtenances." *Id.* at 611, 612.

Further, in discerning an intent to preempt the field, *Napier* applied a more stringent "presumption against preemption" than even this Court's contemporary decisions have seen fit to apply. *Napier* declared without qualification that the "intention of Congress to exclude states from exerting their police power [over locomotive equipment] must be clearly manifested." *Id.* at 611. But when the Court adopted and restated this presumption against preemption in *Rice*—relying expressly upon *Napier*—it suggested that the presumption was warranted only where Congress legislates "in [a] field which the States have traditionally occupied."[2] *Rice*, 331 U.S. at 230; see also *United States v. Locke*, 529 U.S. 89, 108 (2000) (reaffirming that presumption is "not triggered when the State regulates in an area where there has been a history of significant federal presence").

Indeed, the Court's more recent decisions have not only reaffirmed that limitation, *Locke*, but have also called the entire presumption against preemption into serious doubt. See Br. of U.S. Chamber of Commerce as *Amicus Curiae* in Support of Pet'r, *Nat'l Meat Ass'n v. Harris* (No. 10-224). As recent decisions have made clear, preemption "fundamentally is a question of congressional intent" to be discerned from ordinary principles of statutory construction, not artificial presumptions. *English v. Gen. Elec. Co.*,

---

[2] It is curious that Petitioners would quote *Rice*'s statement of the presumption against preemption without noting the very authority *Rice* relied upon to support its invocation of the presumption: *Napier*. Compare Pet. Br. 40-41 (quoting *Rice*) with *Rice*, 331 U.S. at 230 (citing *Napier*).

496 U.S. 72, 78-79 (1990). Thus, as a plurality of the Court has recently concluded, "courts should not strain to find ways to reconcile federal law with seemingly conflicting state law." *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2580 (2011) (Thomas, J.).[3]

Nevertheless, the Court need not determine the scope or continuing viability of any presumption against preemption here. If *Napier* were decided to-

---

[3] Relying on Professor Caleb Nelson's study of the Supremacy Clause's original meaning, Justice Thomas explained that the Clause is a *non obstante* provision that reverses the usual presumption against implied repeals and requires that "federal law should be understood to impliedly repeal conflicting state law." *Id.* at 2579-80 (citing Caleb Nelson, *Preemption*, 86 Va. L. Rev. 231 (2000)). Petitioners' *amici* suggest that the "flipside" of this argument is to eliminate implied field preemption and limit preemption doctrine to direct conflicts between federal and state law. Scholars Br. 30-31. But that conclusion does not follow. As Professor Nelson explains, the Supremacy Clause is "not confined to instances of what the Court calls 'conflict' preemption." Nelson, *Preemption*, at 261. Although "all preemption cases are about contradiction between state and federal law," a "'jurisdictional' rule of federal law—of the sort typically associated with 'field' preemption, whether express or implied—can also contradict a state-law rule." *Id.* at 261-62; see also *English*, 496 U.S. at 79 n.5 (1990) ("[F]ield pre-emption may be understood as a species of conflict pre-emption.").

Moreover, nothing in the text or structure of the Supremacy Clause suggests that it is limited to cases of "direct" conflict. To the contrary, the Clause states that federal law "shall be the supreme law of the land; and the judges in every state shall be bound thereby, *anything in the constitution or laws of any state to the contrary notwithstanding.*" U.S. Const. Art. VI, cl. 2 (emphasis added). This sweeping language does not suggest a reticence on the part of the Framers to preempt state law. Rather, as explained below (in Part II.C), the Framers viewed robust preemption as one of the chief purposes and virtues of the Supremacy Clause.

day, the fact that Congress has exclusively occupied the field of railroad equipment regulation would avoid any need for a presumption, whether or not it applies in other cases.

In short, the fact that the Court found preemption in *Napier* cannot be attributed to a doctrinal deck stacked in favor of preemption. To the contrary, given the opinion's author, the deck was stacked against preemption. But Congress's intent to preempt the field was so "clearly manifested" to the Court in *Napier* that a finding of preemption was compelled. *Napier*, 272 U.S. at 611.

C. *Stare decisis* strongly disfavors abandoning *Napier*'s statutory interpretation.

Because the preemption doctrine *Napier* applied cannot reasonably be dismissed as "an artifact of an outdated jurisprudential era" (Scholars Br. 2), what is really at issue here is not *Napier*'s constitutional methodology but rather the particular result of its statutory interpretation. As the Court put it in *Napier*, the "main question * * * is one of statutory construction"—and more precisely "whether the [LIA] has occupied the field of regulating locomotive equipment." 272 U.S. at 607. *Napier*'s conclusion that Congress intended the Act to occupy the field has been settled law for nearly a century. And there is no good reason for the Court to overrule its prior statutory interpretation.

For one thing, *Napier*'s interpretation of the LIA was correct. Although prior statutes had mandated particular requirements for locomotive equipment or had regulated only certain equipment, the LIA extended those piecemeal regulations in a manner that made clear Congress's intention to cover the entire

field. First, Congress expanded the covered equipment to "include the entire locomotive and tender and *all* parts and appurtenances thereof." *Napier*, 272 U.S. at 608 (quoting the Act) (emphasis added). Second, Congress "confer[ed] upon inspectors and the [ICC] power to prescribe requirements and establish rules to secure compliance" with the Act. *Id.* at 608-09. Third, instead of limiting the ICC's regulatory authority to certain concerns—*e.g.*, rider safety—the Act gave the ICC "broad" authority to prescribe all rules and regulations governing "the design, the construction, and the material of every part of the locomotive." *Id.* at 611. From all of this, the Court discerned Congress's intent that "the standard set by the Commission must prevail." *Id.* at 613. Any other requirements set by the States would necessarily conflict with Congress's intent that authority over all aspects of locomotive equipment be vested in the ICC. *Ibid.*

Even if one could reasonably disagree with *Napier*'s statutory interpretation, however, it should not be overruled. "Time and time again, this Court has recognized that the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Hilton v. S. C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (quotation omitted). Further, *stare decisis* has "special force in the area of statutory interpretation," where, "unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Ibid.* (quotation omitted); see also, *e.g.*, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008); *Flood v. Kuhn*, 407 U.S. 258, 283-85 (1972).

Here, despite several opportunities, Congress has not seen fit to alter the preemptive force of the statu-

tory scheme. To the contrary, it has repeatedly revisited the regulation of locomotive equipment, passing laws in 1965, 1966, 1970, and 1994 without expressing an intent to alter *Napier*'s interpretation. Those laws have served only to expand the federal role; as Respondent's brief explains, they were not meant to repeal or replace the regulations previously established by the LIA. See Resp. Br. 45-48. And it is well settled that when Congress legislates against the backdrop of this Court's interpretations of prior versions of the law, it is presumed to adopt those interpretations. See, *e.g.*, *Merrill Lynch v. Dabit*, 547 U.S. 71, 85 (2006) ("[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its * * * judicial interpretations as well.") (quoting and applying *Cannon* v. *University of Chicago*, 441 U. S. 677, 696-699 (1979)); *accord Bragdon* v. *Abbott*, 524 U. S. 624, 645 (1998).

These principles apply with even greater force in preemption cases, which involve "interpreting statutes that underlie complex regulatory regimes" and "guid[ing] the allocation of state and federal regulatory authority." *Cal. v. Fed. Energy Regulatory Comm'n*, 495 U.S. 490, 498-499 (1990). Indeed, the Court has unanimously found that statutory *stare decisis* outweighs the force (if any) of a "presumption against preemption." *Id.* at 497 (rejecting a statutory interpretation inconsistent with a prior decision, even if the interpretation "would accord with the presumption against finding pre-emption") (quotation omitted). Any attempt to avoid preemption by overruling a prior statutory interpretation "misconceives the deference this Court must accord to longstanding and

well-entrenched decisions." *Id.* at 499; see also *Hilton*, 502 U.S. at 206-07 (holding that statutory *stare decisis* trumps canon requiring clear statement of congressional intent).

Nor is this one of those rare cases where reversal of a statutory precedent may be justified. See *California*, 495 U.S. at 499. *Napier's* holding that the LIA preempts the field of locomotive equipment regulation has been settled for nearly a century. It also has not proven unworkable.[4] Nor, as explained above, has there been any sufficient intervening change in the law. Meanwhile, this Court has repeatedly relied on *Napier* and its reading of the LIA in subsequent decisions. See, *e.g.*, *Rice*, 331 U.S. at 230; *Balt. & O. Ry. Co. v. Jackson*, 353 U.S. 325, 344 (1957); *Urie v. Thompson*, 337 U.S. 163, 192-93 (1949). And an "avalanche of . . . authority" in the lower courts has done the same, reaffirming *Napier's* unambiguous ruling that the LIA preempts the field of locomotive equipment regulation. *In re W. Va. Asbestos Litig.*, 592 S.E. 2d 818, 822 (W. Va. 2003); accord *Law v. Gen. Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997); *Forrester v. Am. Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001); *United Transp. Union v. Foster*, 205

---

[4] Petitioners' *amici* assert that *Napier* has proven unworkable because "lower courts have" found preemption "whenever state law might apply divergent burdens on railroads and railroad equipment manufacturers." Scholars Br. 27. But this is no more than a complaint that *Napier's* preemptive scope is broad—not that it is unworkable. Indeed, overruling *Napier* would be far more unworkable, as it would shatter the present unanimity and allow fifty States to "apply divergent burdens" (*ibid*) in a field previously regulated by a single sovereign. As explained in greater detail below (in Part II.B), this would subvert Congress's purpose of ensuring uniformity in railroad equipment regulation.

F.3d 851 (5th Cir. 2000); *Oglesby v. Del. & Hudson Ry. Co.*, 180 F.3d 458 (2d Cir. 1999); *Springston v. Consol. Rail Corp.*, 130 F.3d 241 (6th Cir. 1997); *Darby v. A-Best Prods. Co.*, 811 N.E. 2d 1117, 1125-26 (Ohio 2004); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171 (Ala. 2002); *Mickelson v. Mont. Rail Link, Inc.*, 999 P.2d 985 (Cal. 2000).

In short, *Napier* amply merits *stare decisis*. Rather than being overruled, it should be reaffirmed.

II. *Amici's* Attempt To Create A Special Presumption Against Preemption Of Tort Lawsuits Should Be Rejected.

In addition to arguing that *Napier* should be overruled, Petitioners attempt to distinguish it on the ground that it involved "state *legislation*, not common-law claims." Pet. Br. 38. *Amici* representing the plaintiffs' bar likewise urge the Court to create a "strong presumption against preemption of state tort remedies," a presumption that would afford tort lawsuits special immunity from preemption. Brief of Amer. Ass'n for Justice ("AAJ Br.") at 7. But there is no reason, in general or in this case, to treat tort lawsuits any differently than state legislative or administrative enactments. And such a presumption would contravene both the plain language and evident purposes of the Supremacy and Commerce Clauses.

A. By its terms, this Court's preemption doctrine applies with equal force to common-law tort claims.

The Supremacy Clause itself is framed in terms that do not support any distinction between state positive regulation and state tort law or other common-law claims: It emphatically states that federal law "shall be the supreme law of the land; and the judges

in every state shall be bound thereby, *anything in the constitution or laws of any state to the contrary notwithstanding*." U.S. Const. Art. VI, cl. 2 (emphasis added). By its terms, that injunction applies with equal force whether the "laws of [the] state" at issue are positive regulations or common-law rules, and it binds "the judges in every state" regardless of what law they are applying.

The notion that special rules apply to common-law tort claims likewise finds no support in this Court's decisions. In assessing preemption, the Court has long observed that its "concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered," and that "[s]uch regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247-48 (1959). The reason is obvious:

> The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

Id. at 247.

More recently, in *Geier v. American Honda Motor Co.*, the Court reaffirmed that there is no special exception for state tort law. 529 U.S. 861 (2000). There the Court did not hesitate to find that a state tort suit alleging a duty to install an airbag was preempted by the Department of Transportation's decision not to require airbags for all automobiles. Although *amici*

now claim that preemption is chiefly "concerned with setting aside positive state commands," as opposed to "damage awards that merely 'persuade' manufacturers to act" (AAJ Br. 24), the Court in *Geier* observed that its "pre-emption cases ordinarily *assume* compliance with the state-law duty in question." 529 U.S. at 882. Thus, as the Court recognized earlier in *Garmon*, the distinction between a legislative command and a tort duty makes little difference in the context of preemption: both impose a state-law duty that may differ from federal law, and both make it costly to breach the duty. The rationale for preemption is therefore the same in both situations.

To be sure, this Court has sometimes held that particular federal statutes do not preempt state tort law. But those decisions adopt no special presumption favoring tort suits. In *Silkwood v. Kerr-McGee Corp.*, for example, the Court exempted tort lawsuits from preemption by one statute, but only because the Court found "ample evidence that Congress had no intention of forbidding the states from providing [tort] remedies." 464 U.S. 238, 251 (1984). Although Congress had generally preempted the field of nuclear power plant safety, it expressly indemnified power plant operators from tort liability and waived defenses in certain situations. Because those express provisions necessarily "assumed that persons injured by nuclear accidents were free to utilize existing tort law remedies," it was unlikely that Congress had any intent to preempt those remedies. *Id.* at 252.

The Court did not suggest, however, that field preemption should *ordinarily* stop short of state tort law—indeed, quite the opposite. The Court recognized a "tension between the conclusion that safety regulation is the exclusive concern of the federal law

and the conclusion that a state may nevertheless award damages based on its own law of liability." *Id.* at 256. That tension would be "tolerated" in *Silkwood* only because Congress had clearly intended it. *Ibid.* The Court thus made clear that it was dealing with an unusual case, not announcing a general exception to the field preemption doctrine.

Other decisions finding no preemption of state tort claims are similarly narrow. In *Sprietsma v. Mercury Marine*, the Court limited preemption to state positive enactments because the statute contained an express preemption clause that was "most naturally read as not encompassing common-law claims." 537 U.S. 51, 63 (2002). So too in *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431 (2005), where the express preemption clause prohibited States from imposing "requirements * * * in addition to or different from" federal law. *Id.* at 443. Construing this particular language, the Court held that the statute *would* preempt state tort claims seeking to impose "different or additional *requirements*," such as a different duty of care. *Id.* at 448 (quotation omitted). But the language of the statute "does not preclude States from imposing different or additional *remedies*" to enforce the federal requirements. *Ibid.* (quotation omitted). Neither *Sprietsma* nor *Bates* involved field preemption, and both turned on the particular language of an express preemption clause.

In sum, consistent with the text of the Supremacy Clause, this Court has never adopted a general presumption against preemption of state tort law. And it should not do so here.

B. Tort lawsuits are even more likely than state legislation to interfere with the LIA's goal of uniform railroad equipment regulation.

Because such a special presumption would have no sound basis, the question posed by a claim of field preemption is simply what Congress intended in enacting a particular statute. And *Napier* has already held that the LIA "was intended to occupy the field." 272 U.S. at 613. Nothing indicates that Congress intended to exempt state tort remedies from its otherwise exclusive decision to vest all regulatory authority in the ICC and its successor, the Secretary of Transportation.

1. Unlike *Silkwood*, *Sprietsma*, or *Bates*, the LIA contains no specific language indicating an intent to allow state tort lawsuits. Instead, as in *Geier*, the statute delegates authority to an agency to regulate the safety of locomotive equipment. And as in *Geier*, the agency made a deliberate decision, based on its knowledge and expertise, not to impose the very duty the plaintiff seeks to establish through state tort law—here, a requirement that manufacturers rid locomotive parts of asbestos. See U.S. Dep't of Transp., Report to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996), at 10-12 (finding that "further action with respect to the presence of asbestos in locomotive cabs" is not "warranted at this time"). Thus, although *amici* proclaim that every wrong must have a remedy (AAJ Br. 9), the agency that Congress has empowered to regulate locomotive equipment has determined that the presence of asbestos in locomotive parts is not a wrong in the first place. This is thus not a situation where a state tort lawsuit would provide compensation for a defendant's violation of federal law. Cf. *Bates*, 544 U.S. at 448;

Pet. Br. 39 n.31. Instead, the plaintiff here seeks to impose a new and different state-law duty.

Such a proliferation of differing state duties—whether imposed by tort law or statute—was plainly what Congress sought to avoid by delegating rule-making authority over "the design, the construction and the material of every part of the locomotive" to a federal agency. *Napier*, 272 U.S. at 611. Because locomotives move constantly from State to State, uniform national regulation is imperative, lest manufacturers be subject to a new set of equipment regulations each time a locomotive rolls into another State. Judge Kozinski has explained the consequences: "If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state." *Law*, 114 F.3d at 910-11 (holding that LIA preempts state tort claims). Not only would this undermine Congress's goal of uniform, federal standards, it would also "transfer the regulatory locus from the Secretary of Transportation to the state courts—a result the BIA was clearly intended to foreclose." *Id.* at 911-12.

Indeed, subjecting manufacturers to tort lawsuits in fifty different States would be an even greater threat to uniformity than subjecting them to state administrative or legislative regulation. Unlike positive enactments mandating particular equipment safety requirements, tort standards are highly malleable and juries are unpredictable. And even if "there is general agreement on the standard for an unreasonably dangerous product," the standard itself is inherently amorphous. AAJ Br. 14 n.4. Who is to say, applying the typical "risk-utility" standard, whether

the risks of a particular locomotive design choice outweigh its utility? To have juries in fifty different States answer that question would plainly undermine Congress's determination to have it answered by a single federal agency.

2. Nor is this a case where a "long history of litigation against manufacturers" pre-dated Congress's entry into the regulated field, making it unreasonable to presume that Congress "intended to deprive injured parties of a long available form of compensation." *Bates*, 544 U.S. at 449.

Instead, as Petitioners' *amici* acknowledge, "at the time Congress enacted the LIA, the common law did not permit workers who were not in privity of contract with equipment manufacturers to recover from manufacturers for injury caused by unsafe products." AAJ Br. 2. Thus, employees have *never* been able to bring tort lawsuits against locomotive equipment manufacturers—not before Congress enacted the LIA, and not after the Court held that it preempted the field.

It is hard to imagine that Congress could have intended for its goal of uniform regulation to be sacrificed to state-law relief that did not even exist at the time.

3. This does not mean that Congress left employees entirely without recourse for locomotive-related injuries. Congress passed the Federal Employers' Liability Act (FELA) to provide a remedy for injured railroad employees, and FELA permits employees to sue their railroad employers for negligence. 45 U.S.C. § 51 *et seq.* This remedy is in some respects more favorable to employee plaintiffs than state tort law, because it subjects railroads to liability

if they "played any part in bringing about the injury." *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2634 (2011). Yet, despite this generous remedy, the fact that FELA is limited to suits against employers, and does not allow employees to sue manufacturers, only underscores that Congress did not intend to subject equipment manufacturers to tort liability. See *id.* at 2644 (observing that "FELA's limitations on who may sue, and for what, reduce the risk of exorbitant liability").

In short, although FELA regulates the employer-employee relationship, the LIA regulates "the design, the construction and the material" of locomotive parts. *Napier*, 272 U.S. at 611. And Congress chose to have manufacturers regulated, not through a tort remedy, but through uniform standards set by an expert federal agency.

C. A special presumption against preemption would contravene the language and purpose of the Supremacy and Commerce Clauses.

A special presumption against preemption of state tort suits would also contravene not only the language of the Supremacy Clause, but also the purposes of that Clause and the Commerce Clause. Indeed, by opting to have railroad equipment regulation determined exclusively as a matter of national policy, Congress sought to accomplish the very purposes for which the Supremacy Clause was originally intended—and which this Court's longstanding field preemption doctrine protects, to-wit: removing obstacles to a national market and facilitating a national government with the power to regulate interstate commerce in a uniform and coordinated manner.

As James Madison explained in advocating for the newly proposed Constitution, "[t]he defect of power" in the government established under the Articles of Confederation "to regulate the commerce between its several members * * * [has] been clearly pointed out by experience." The Federalist No. 42, at 235 (James Madison) (Clinton Rossiter ed., 1961). Indeed, under the Articles of Confederation, the "multiplicity of laws in [the] several states" was one of the chief "evils * * * of our situation." James Madison, Vices of the Political System of the United States (1787). The problem, Madison added, was that States were acting as "little republics," encroaching on the rights of outsiders. *Ibid.* But according to Madison, the creation of an authoritative government with power to regulate commerce nationwide would dampen this impulse, as "an extensive Republic [a]meliorates the administration of a small Republic." *Ibid.*

Alexander Hamilton likewise explained the need for a national government with authority to prescribe uniform commercial regulations, lest "[e]ach State, or separate confederacy, would pursue a system [of] commercial polity peculiar to itself [that would create] distinctions, preferences and exclusions, which would beget discontent." The Federalist No. 7, at 30-31 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Thus, "[t]he importance of the Union, in a commercial light, is one of those points, about which there is least room to entertain a difference of opinion, and which has, in fact commanded the most general assent of men, who have any acquaintance with the subject." The Federalist No. 11, at 52 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Such a union required not only that the national government have authority to pass uniform laws go-

verning interstate commerce, but also that those laws supersede state laws that might interfere with federal authority. For this reason, the Framers thought that "[t]he character of such a [federal] governme[nt] ought * * * to be paramount to the state constitutions." James Madison, Notes of the Constitutional Convention (May 29, 1787), in 1 The Records of the Federal Convention of 1787, at 17-23 (Max Farrand ed., 1911). And the Commerce and Supremacy Clauses were enacted to ensure that this would be so.

In fact, this was one of the core purposes of the Constitutional Convention of 1787. That is why, when George Washington transmitted the new Constitution to the Continental Congress, he touted as one of the three critical reasons for its adoption the fact that it vested the power of "regulating Commerce" in "the general Government of the Union." Letter from Federal Convention President George Washington to the President of Congress, Transmitting the Constitution (Sept. 17, 1787). And in so doing, he expressly recognized that, given the Supremacy Clause, the price of that arrangement would be States' ceding a portion of their sovereignty to the national government. Analogizing the rights of the States to the rights of individuals, and invoking the "social compact" idea popularized by such philosophers as Rousseau and Locke, he said: "It is obviously impracticable in the federal Government Of these States to secure *all* Rights of independent Sovereignty to each and yet provide for the Interest and Safety of all—Individuals entering into Society must give up a Share of Liberty to preserve the Rest." *Ibid* (emphasis added).

Thus, although federalism and the States' "independent sovereignty" were undoubtedly part of the

Framers' constitutional vision, the Framers also saw uniform national regulation as essential in the realm of interstate commerce. The *amici's* proposed presumption against preemption of state tort suits would seriously threaten that system of uniform national regulation in this and other areas, thereby contravening the Framers' vision for the government created by the Constitution.

CONCLUSION

In short, when railroads became the Nation's chief engine of interstate commerce, Congress, in enacting the LIA, exercised exactly the sort of federal authority the Framers sought to enable through the Commerce and Supremacy Clauses. By safeguarding that authority against encroachment from the States, this Court's longstanding field preemption doctrine accomplishes the Framers' vision in a manner fully consistent with the text of those clauses. Any weakening of that doctrine—by overruling *Napier* or by creating a special presumption against the preemption of tort suits—would contravene both the language and the purposes of those critical provisions.

The decision below should be affirmed.

Respectfully submitted.

ROBIN S. CONRAD
KATHRYN COMERFORD TODD
SHELDON GILBERT
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

*GENE C. SCHAERR
STEFFEN R. JOHNSON
JACOB R. LOSHIN
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000
gschaerr@winston.com

LINDA T. COBERLY
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-6600

*COUNSEL OF RECORD

OCTOBER 2011

AMICUS CURIAE BRIEF

FILED
OCT 7 - 2011
OFFICE OF THE CLERK

No. 10-879

In the Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, WIDOW IN HER OWN RIGHT,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF AFFIRMANCE

R. MATTHEW CAIRNS
Counsel of Record
PRESIDENT, DRI
55 West Monroe, Suite 2000
Chicago, IL 60603
(312) 795-1101
cairns@gcglaw.com

DIANE B. BRATVOLD
KEVIN M. DECKER
JONATHAN P. SCHMIDT
Briggs and Morgan P.A.
80 South Eighth Street
Suite 2200
Minneapolis, MN 55402
(612) 977-8400

Counsel for Amicus Curiae

2011 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

Library
Law Library

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 9

I. The Proper Analysis Of Scope Of Preemption Drives The Resolution Of This Appeal And Supports Affirmance 9

A. The Scope Of Authority Delegated By Congress Determines The Scope Of Field Preemption 9

B. Field Preemption Of State Regulation And Common Law Tort Claims Should Be Upheld 20

II. Erosion Or Abandonment Of Field Preemption Would Flout Stare Decisis And Destroy Settled Economic Expectations 29

A. Stare Decisis Is Fundamental And Must Be Preserved 29

B. Field Preemption Has Resulted In Reasonable And Settled Industry Expectations 33

C. This Court Should Preserve Field Preemption 36

CONCLUSION.....38

TABLE OF AUTHORITIES

CASES

Agostini v. Felton,
521 U.S. 203 (1997) 30

Amalgamated Ass'n of St., Elec., Ry. & Motor Coach Emps. of Am. v. Lockridge,
403 U.S. 274 (1971) 32

Arizona v. Rumsey,
467 U.S. 203 (1984) 32

Bell v. Ill. Cent. R.R.,
236 F. Supp. 2d 882 (N.D. Ill. 2001) 26

California v. Fed. Energy Reg. Comm'n,
495 U.S. 490 (1990) 31

Chick Kam Choo v. Exxon Corp.,
486 U.S. 140 (1988) 23

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 28

Citizens United v. Fed. Election Comm'n,
-- U.S. --, 130 S. Ct. 876 (2010) 32, 34

City of Burbank v. Lockheed Air Terminal Inc.,
411 U.S. 624 (1973) ..... *passim*

Crosby v. Nat'l Foreign Trade Council,
530 U.S. 363 (2000) 37

CSX Transp., Inc. v. Easterwood,
507 U.S. 658 (1993) 3, 28

Darby v. A-Best Prods. Co.,
811 N.E.2d 1117 (Ohio 2004) 24, 26

Easton v. Iowa,
188 U.S. 220 (1903) 16

English v. Gen. Elec. Co.,
496 U.S. 72 (1990) 9

Fidelity Fed. Sav. & Loan Ass'n v. Cuesta,
458 U.S. 141 (1982) ..... *passim*

Forrester v. Am. Dieselelectric,
255 F.3d 1205 (9th Cir. 2001) 26

Freightliner Corp. v. Myrick,
514 U.S. 280 (1995) 9

Geier v. Am. Honda Motor Co.,
529 U.S. 861 (2000) 28

General Motors Corp. v. Kilgore,
853 So.2d 171 (Ala. 2002) 23-24, 26

Gibbons v. Ogden,
22 U.S. (9 Wheat.) 1 2

Hilton v. S. Car. Pub. Rys. Comm'n,
502 U.S. 197 (1991) 31-32

Houston v. Moore,
18 U.S. 1 (1820) 33

Illinois Brick Co. v. Ill.,
431 U.S. 720 (1977) 31

In re W. Va. Asbestos Litig.,
592 S.E.2d 818 (W. Va. 2003) 23-24, 26

In re: Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993,
188 F. Supp. 2d 1341 (S.D. Ala. 1999) 26

Int'l Longshoremen's Ass'n v. Davis,
476 U.S. 380 (1986) 4

Kurns v. A.W. Chesterton. Inc.,
620 F.3d 392 (3d Cir. 2010) 7

Kurns v. Chesterton,
No. 08-2216, 2009 WL 249769 (E.D. Pa. 2009) 7

Law v. General Motors,
114 F.3d 908 (9th Cir. 1997) 25

Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton,
377 U.S. 252 (1964) 30

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001) 5

McCulloch v. Maryland,
4 Wheat. 316 (1819) 4, 15-17

Medtronic v. Lohr,
518 U.S. 470 (1996) 5, 24, 27-28

Napier v. Atl. Coast Line R.R. Co.,
272 U.S. 605 (1926) ..... *passim*

Norfolk S. Ry. Co. v. Shanklin,
529 U.S. 344 (2000) 3, 28

Oglesby v. Delaware & Hudson Ry.,
180 F.3d 458 (2d Cir. 1999) 26

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 29-30

Payne v. Tennessee,
501 U.S. 808 (1991) 30, 34

Pearson v. Callahan,
555 U.S. 223 (2009) 33

Prigg v. Pennsylvania,
41 U.S. 539 (1842) 2, 33

Ray v. Atl. Richfield Co.,
435 U.S. 151 (1978) ..... *passim*

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 5-6, 30, 34

Roth v. I & M Rail Link, L.L.C.,
179 F. Supp. 2d 1054 (S.D. Iowa 2001) 26

San Diego Bldg. Trades Council v. Garmon,
359 U.S. 236 (1959) 22, 32

Scheiding v. Gen. Motors Corp.,
993 P.2d 996 (Cal. 2000) 24-26

Seaman v. A.P. Green Indus., Inc.,
707 N.Y.S.2d 299 (Sup. Ct. 2000).....26

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984).....22, 24, 27-28

Southern Ry. v. Lunsford,
297 U.S. 398 (1936).....20

Springston v. Consol. Rail Corp.,
130 F.3d 241 (6th Cir. 1997) 26

State Oil Co. v. Kahn,
522 U.S. 3 (1997).....30

United States v. Locke,
529 U.S. 89 (2000)..... *passim*

Vasquez v. Hillery,
474 U.S. 254 (1986).....29

Watters v. Wachovia Bank, N.A.,
550 U.S. 1 (2007).....15-17

Welch v. Texas Dep't of Highways & Pub. Transp.,
483 U.S. 468 (1987).....30

STATUTES, RULES & REGULATIONS

12 U.S.C. § 371(a).....15, 35

12 U.S.C. § 1464(a)(1) 35

46 U.S.C. § 391a(1)(3) 35

49 U.S.C. § 1348.....36

49 U.S.C. § 20106 35

49 U.S.C. § 20701, *et seq.* 6

INTEREST OF AMICUS CURIAE[1]

Amicus curiae DRI – The Voice of the Defense Bar ("DRI") is an international organization comprised of approximately 22,000 attorneys defending businesses and individuals in civil litigation. DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system in America. DRI has long been a voice in the ongoing effort to make the civil justice system fairer, efficient, and – where national issues are involved – consistent. To promote these objectives, DRI participates as amicus curiae in cases such as this one because it raises an issue of importance to DRI's members and to the judicial system. DRI seeks to contribute to the Court's consideration of cases by offering its perspective.

DRI members represent federally-regulated businesses and industries in tort litigation in both state and federal courts. DRI members are regularly called upon to inform and advise clients about the potential liability that they face for making business decisions based upon state tort law. DRI members are asked to offer counsel regarding the parameters of permissible conduct

---

[1] Pursuant to this Court's Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than amicus curiae or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to this Court's Rule 37.3.

and the sometimes conflicting obligations imposed under federal and state law and federal and state regulations. DRI members are therefore well-positioned to offer this Court practical insight based on first-hand experience with the impact of state tort litigation on federally-regulated businesses and industries. Because our organization is devoted to representing the interests of lawyers who defend businesses and industries in civil litigation, the issue of federal preemption is of great importance to DRI. DRI frequently participates as amicus curiae in cases addressing federal preemption. *See, e.g.*, *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314, among others.

The prevailing law on preemption must afford consistency and clarity to potential civil defendants about permissible conduct and its outer limits. Federal preemption has been a feature of this Court's jurisprudence for almost two centuries. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 82 (1824) ("[T]he act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted [by the Constitution], must yield to it."). In particular, federal preemption that arises when Congress has decided to occupy a field has been embraced in decisions invalidating state laws as early as 1842. *Prigg v. Pennsylvania*, 41 U.S. 539, 617-18 (1842) ("[T]he legislation of Congress, in what it does prescribe, manifestly indicates, that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do, is as

expressive of what its intention is, as the direct provisions made by it.").

In the course of applying federal preemption, this Court has recognized that private tort claims may be barred as a result; individuals may not accomplish by private lawsuit what a state government may not accomplish by legislative act. *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 675 (1993) (holding that the Federal Railroad Safety Act "should be understood as covering the subject matter of train speed with respect to track conditions" therefore plaintiff's negligence claim for "excessive speed" is preempted); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 358-59 (2000) (common law tort claim failed because federal law "displace[d] ... state law concerning the [subject matter], [which] ... pre-empts state tort actions").

Field preemption has been recognized in some of the country's oldest and most important businesses and industries, *e.g.*, railroads and locomotive equipment, shipping and tankers, savings and loan associations, national banks, and air traffic. The businesses and industries to which field preemption has been applied are heavily regulated by federal agencies and, not surprisingly, have reasonably relied on federal regulations to govern their conduct and business decisions. The erosion or removal of field preemption would expose these vital and inherently interstate enterprises to a myriad of different common law standards, the threat of potentially-debilitating tort liability and,

perhaps more importantly, tremendous uncertainty.

Businesses need to know what standard of care controls when business decisions are made. Railroads, locomotive equipment manufacturers and distributors, along with many other businesses, employees and consumers, have benefitted from a regime in which an expert federal regulatory agency makes informed and comprehensive decisions about design, construction, materials, services, and products. DRI therefore has a strong interest in assuring that this Court continues to enforce federal preemption and, in particular, field preemption.

SUMMARY OF ARGUMENT

The doctrine of federal preemption finds its source in the Supremacy Clause of the Constitution, which commands that the laws of the United States "shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." United States Const. art. VI, cl. 2; *see also McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819) ("It is the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments"); *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 388 (1986) ("Pre-emption [is] the practical manifestation of the Supremacy Clause[.]").

Federal preemption has been applied case-by-case and has resulted in a modest mountain of case law. As this Court has commented, the Constitution's "clear and simple mandate has generated considerable discussion in cases where we have had to discern whether Congress has pre-empted state action in a particular area." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41 (2001). Over a number of decisions considering a wide variety of claims and sometimes overlapping federal acts, agency regulations, and state laws, this Court has articulated no bright-line test; "each case turns on the peculiarities and special features of the federal regulatory scheme in question." *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 638 (1973).

Yet some common themes have emerged within this substantial precedent: "The question in each case is what the purpose of Congress was." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) ("The purpose of Congress is the ultimate touchstone" in every preemption case). And Congress may express its purpose to preempt state action either expressly or by implication. *Fidelity Fed. Sav. & Loan Ass'n v. Cuesta*, 458 U.S. 141, 230 (1982). Indeed, Congress's purpose or intent may be "evidenced in several ways": (1) the "scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; (2) the "Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of

state laws on the same subject"; (3) the "object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose"; or (4) the "state policy may produce a result inconsistent with the objective of the federal statute." *Rice*, 331 U.S. at 230 (citations omitted).

In the regulation of locomotive and locomotive equipment, this Court decided long ago that Congress intended the Boiler Inspection Act ("BIA") – now codified at 49 U.S.C. § 20701, *et seq.*, also known as the Locomotive Inspection Act ("LIA") – to "occupy the field." *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 613 (1926). The Court's conclusion was based on "[t]he broad scope of the authority conferred upon the Commission." *Id.* Congress has since transferred that authority to the Department of Transportation, but the scope of authority bestowed remains broad. As explained in *Napier*:

> [T]he power delegated to the Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances.

Id. at 611.

In this case, the district court granted summary judgment to respondents, who manufactured or distributed locomotives and

locomotive equipment, based on federal preemption as announced in *Napier*. The court reasoned that "because plaintiff alleges that [decedent] contracted mesothelioma through his contact with locomotive equipment, the reasoning and holding of *Napier* plainly applies." *Kurns v. Chesterton*, No. 08-2216, 2009 WL 249769, *3 (E.D. Pa. 2009). "Plaintiff's common law tort claims are preempted by the BIA, a federal law enacted to occupy the field of regulating locomotives, their parts and appurtenances." *Id.* at *7.

The Third Circuit affirmed. "The plaintiffs' claims undeniably involve the material used in locomotive parts, both of which fall under the definition of 'parts and appurtenances' of locomotives" and "therefore are preempted by federal law." *Kurns v. A.W. Chesterton. Inc.*, 620 F.3d 392, 399 (3d Cir. 2010). "Congress's intent in enacting and amending the LIA was to preempt completely the field of railroad parts and appurtenances." *Id.*

This Court should affirm the lower courts and hold that the Locomotive Inspection Act preempts the field of locomotive "design, construction, and the material of every part of the locomotive" and thereby preempts petitioners' attempt to impose standards through common law product liability claims.

At the heart of this appeal is how the scope of field preemption is determined. Petitioners and the Solicitor General correctly note that field preemption is determined by the scope of the

regulated field. (Pet. Br. at 16, 20; SG Br. at 11, 13.) But after that, petitioners and the Solicitor General narrowly focus their analysis of the LIA on how the federal agency has exercised its regulatory authority in the past and what the agency was "required" to do under the LIA. (Pet. Br. at 22, 42; SG Br. at 16, 18.) At the same time, petitioners and the Solicitor General distort the language of the LIA. (Pet. Br. at 21-23; SG Br. at 13-14.) This analysis is not consistent with this Court's precedent. Instead, the scope of the regulated field is determined by the scope of authority that Congress has delegated to the agency. This rule of law is evident in past decisions on field preemption which have consistently examined three touchstones – statutory language, Congressional intent, and the overall statutory scheme including the history of federal regulation.

Respondents' brief thoroughly explains the correct analysis of the LIA specifically and the federal regulatory scheme concerning railroads, locomotive and locomotive equipment generally; consequently, that analysis will not be repeated here. (Resp. Br. at 30-42.) But additional precedents incorporate a similar analysis in other heavily-regulated areas in which this Court has recognized field preemption, for example, oil tankers, savings and loan institutions, national banks, and air traffic. These parallel precedents lend force to respondents' arguments and illuminate how this Court consistently applies field preemption.

Additionally, related case law establishes that abandoning field preemption or narrowing it to allow regulation of interstate-commerce business through common law tort claims would have grave consequences. Not only would petitioners' proposed rule of law defy stare decisis, but also it would destroy settled expectations held by those in businesses and industries that have been historically regulated by federal law and not by widely-varying jury decisions issued from diverse pockets of the country.

ARGUMENT

I. THE PROPER ANALYSIS OF SCOPE OF PREEMPTION DRIVES THE RESOLUTION OF THIS APPEAL AND SUPPORTS AFFIRMANCE

A. The Scope Of Authority Delegated By Congress Determines The Scope Of Field Preemption.

This Court has recognized that a federal statute "implicitly overrides state law" when "the scope of a statute indicates that Congress intended federal law to occupy a field exclusively." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *see also English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). More to the point, this Court has held that the scope of preemption is determined, at least in part, by examining whether the challenged state action is within the authority delegated to the federal agency. *Fidelity Fed. Sav. & Loan Ass'n*,

458 U.S. at 154 ("whether the Board meant to pre-empt California's due-on-sale law, and, if so, whether that action is within the scope of the Board's delegated authority").

Because the LIA broadly delegates regulatory authority to a federal agency for locomotive and locomotive equipment design, construction, and materials, petitioners' claims that purport to impose common law standards are preempted. Precedent from other highly regulated fields illustrates the correct analysis.

1. Field Preemption Of Oil Tanker Regulation

In *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 168 (1978), this Court struck down a state law requiring tankers to have "standard safety features" as preempted by Congress's enactment of the Ports and Waterways Safety Act of 1972 ("PWSA"). The Court determined the scope of preemption by examining the statutory language, after which it concluded that Congress broadly delegated authority to the Secretary of Transportation and specifically delegated authority over the design, construction, and operation of oil tankers. The Court summarized:

> This statutory pattern shows that Congress, insofar as design characteristics are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to

> proceed in the navigable waters of the United States. This indicates to us that Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements.

Id. at 163. Allowing state regulation of any aspect of tanker design "would at least frustrate what seems ... to be the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers." *Id.* at 165. Turning to legislative history leading to the passage of the PWSA, the Court concluded that, "the Nation was to speak with one voice with respect to tanker-design standards." *Id.* at 166. After reviewing statutory language, statutory pattern, and Congressional intent, the Court also held the PWSA preempted state laws that limited tanker size. *Id.* at 178. The Court declared that Congress intended that "there would be a single decisionmaker, rather than a different one in each State." *Id.* at 177.

Twenty-two years later, in *United States v. Locke*, 529 U.S. 89 (2000) the Court again struck down as preempted a variety of state laws concerning oil tankers, *i.e.*, navigation watch, language skills, training and casualty reporting requirements. *Id.* at 116. *Locke* relied in large part on *Ray's* application of field preemption. *Id.* at 104 ("The *Ray* Court's interpretation of the PWSA is correct and controlling."). Somewhat differently from *Ray*, the Court began its analysis in *Locke* by

considering the historical position Congress has occupied in regulating interstate navigation generally:

> The State of Washington has enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic and is now well established. The authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution.

Id. at 99. The opinion discussed several precedents in which the Court had upheld federal supremacy in the regulation of maritime commerce during the 1800s. *Id.* at 99-100. And the Court recognized an even broader statutory pattern than the one discussed in *Ray*. *Locke* summarized federal statutes that delegated wide-ranging authority to federal agencies over the design and construction of tankers in 1936 and 1972.[2] *Id.* at 100-02.

---

[2] The Court also noted that the assumption against preemption that sometimes applies to a State's exercise of its police powers "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *Locke*, 529 U.S. at 90. Specifically, "[t]he state laws now in question bear upon national and international maritime commerce and in this area there is no beginning assumption that concurrent regulation by the State is a valid

"[A]gainst this background," the Court proceeded with its statutory analysis of the 1990 Act. *Id.* at 100.

Locke reaffirmed *Ray's* holding that state regulations were preempted "because they were within a field reserved for federal regulation." *Id.* at 111. The Court also rejected the suggestion that *Ray* narrowly applied field preemption only to tanker design and construction, noting that these terms "cannot be read in isolation from the other subjects" delegated to the federal government. *Id.* "Congress has left no room for state regulation of these matters." *Id.* at 91.

The Court concluded by flatly rejecting that sufficiency of federal regulations was at issue. "The issue is not adequate regulation but political responsibility; and it is, in large measure, for Congress and the Coast Guard to confront whether their regulatory scheme, which demands a high degree of uniformity, is adequate." *Id.* at 117.

---

exercise of its police powers." *Id.* at 108. *Locke's* analysis on this point cannot be reconciled with petitioners' position. (Pet. Br. at 31-32.) A significant federal presence in railroad, locomotive and locomotive equipment regulation began long ago, contemporaneously with the widespread use of railroads. Respondents identify federal legislation dating back to 1887. (Resp. Br. at 3-4.)

2. Field Preemption Of Savings And Loan, And National Bank Regulation

In *Fidelity Fed. Sav. & Loan Ass'n v. Cuesta*, 458 U.S. 141 (1982), this Court upheld field preemption of state limitations on a due-on-sale practices because Congress had empowered the Federal Home Loan Bank Board ("Board") to provide for the organization, operation, and regulation of savings and loan associations. *Id.* at 170. Based on explicit language in the Board's regulations, the Court held that the federal regulations were "meant to preempt conflicting state limitations on the due-on-sale practices of federal saving and loans." *Id.* at 159. Additionally, in passing due-on-sale regulations, the Board was acting with the "ample authority" Congress had delegated to it. *Id.*

To reach this conclusion, the Court relied on the language and history of the 1936 Act that had created the Board. Congress gave the Board "plenary authority to issue regulations governing federal savings and loans." *Id.* at 160. In particular, the Court made three observations: (1) Congress did not create any express "limits on the Board's authority," (2) Congress authorized the Board to provide for "operations", a broad term that includes mortgage loan instruments, and (3) Congress gave the Board the authority to issue what it deemed "best practices" and gave this authority to "not any particular state." *Id.* at 161-62.

The Court supplemented this analysis of the statutory scheme with a review of legislative history. In the federal statute creating the Board, the Court concluded, "Congress delegated to the Board broad authority to establish and regulate 'a uniform system of [savings and loan] institutions where there are not any now' and to 'establish them with the force of the government behind them, with a national charter.'" *Id.* at 166 (quotation omitted).

Similarly, more than two decades later, this Court applied field preemption to state regulation of national banks. In *Watters v. Wachovia Bank*, N.A., 550 U.S. 1, 7 (2007), the Court struck down state licensing, reporting, and visitorial schemes for a national bank's mortgage activities, holding the bank was subject to a federal agency's "superintendence." As it did in *Locke*, the Court began its analysis by considering the historical position Congress has occupied in regulating national banks generally. The Court noted that *McCulloch v. Maryland*, 4 Wheat. 316 (1819) held that "federal law [is] supreme over state law with respect to national banking." 550 U.S. at 10. Congress thereafter enacted the National Bank Act in 1864, which established "the system of national banking still in place today." *Id.* The National Bank Act authorized mortgage lending, subject to regulation by the Office of the Comptroller of the Currency. *Id.* at 12 (citing 12 U.S.C. § 371(a)).

The Court then recognized that preemption of national banking regulations was not limited to express conflicts between state and federal law because the federal government had occupied the

field: "Congress did not intend, we explained, 'to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation...[C]onfusion would necessarily result from control possessed and exercised by two independent authorities.'" *Id.* at 14 (quoting with omissions from *Easton v. Iowa*, 188 U.S. 220, 229 (1903)). Since field preemption applied, states cannot confer "examination and enforcement authority over mortgage lending, or any other banking business done by national banks." *Id.* at 14-15.

But the Court's analysis went even deeper and concluded that field preemption also defeated state regulation of national bank operating subsidiaries:

> We have never held that the preemptive reach of the NBA extends only to a national bank itself. Rather, in analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the exercise of a national bank's *powers*, not on its corporate structure.

Id. at 18 (emphasis original). Because the subsidiary is "empowered to do only what the bank itself could do" and the National Bank Act "vests visitorial oversight" in Office of the Comptroller of Currency, state regulators cannot subject either national banks or their subsidiaries "to multiple

audits and surveillance under rival oversight regimes." *Id.* at 21.

3. Field Preemption of Air Traffic Regulation

This Court again analyzed statutory language, Congressional intent, and overall statutory scheme when it applied the field preemption doctrine to the regulation of air traffic. In *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 626, 640 (1973), the Court struck down a city ordinance prohibiting jet aircraft from taking off and landing between the hours of 11 p.m. and 7 a.m., even though the curfew affected only one regularly scheduled flight. In support of its decision, the Court examined the Federal Aviation Act of 1958, which not only asserted "exclusive national sovereignty in the airspace of the United States" but also gave the Federal Aviation Administration (FAA) "broad authority to regulate the use of the navigable airspace." *Id.* at 626-27. This authority included directing the FAA to "prescribe air traffic rules and regulations governing the flight of aircraft." *Id.* at 627 n.3.

Congress's decision in 1972 to specifically direct the regulation of noise was factored into the Court's analysis. The Noise Control Act provided that the FAA would consult with local authorities and make recommendations to Congress regarding aircraft noise. *Id.* at 628. But Congress also gave the Environmental Protection Agency (EPA) authority to propose aircraft noise regulations to the FAA. *Id.* at 629. Reading the 1958 and 1972

Acts together, the Court concluded that the 1972 Act "reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, pre-empting state and local control." *Id.* at 633.

"There is, to be sure, no express provision of pre-emption in the 1972 Act," the Court stated, but that "is not decisive." *Id.* Rather, "the pervasive nature of the scheme of federal regulation of aircraft noise ... leads us to conclude that there is pre-emption." *Id.* In addition to analyzing the regulatory scheme, this Court considered legislative history. *Id.* at 634-38. Even though noise control is "deep-seated in the police power of the States," field preemption applied because the 1972 Act "seems to us to leave no room for local curfews or other local controls." *Id.* at 638. Based on the interplay between the 1972 Act and the regulations already adopted by the FAA, the Court concluded that "interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." *Id.* at 639.

Allowing local authorities to intervene with multiple curfews would lead to "fractionalized control of the timing of takeoffs and landings [and] would severely limit the flexibility of FAA in controlling air traffic flow." *Id.* This Court concluded it was "not at liberty to diffuse the power given by Congress to FAA and EPA by letting the States or municipalities in on the planning." *Id.* at 640.

4. Field Preemption Of Locomotive And Locomotive Equipment Regulation

Almost 85 years ago, this Court addressed whether the Locomotive Inspection Act "occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation." *Napier*, 272 U.S. at 607. At issue in *Napier* were Georgia and Wisconsin laws requiring that all locomotives operating in those states have certain equipment. Locomotive carriers sought to enjoin state officials from enforcing the state laws that prohibited the use of locomotives not equipped with the prescribed devices. *Id.* at 607-08.

This Court confirmed that Congress, through the LIA, conferred upon the Interstate Commerce Commission[3] "general" authority to regulate locomotive and locomotive equipment; consequently, the state requirements were preempted as falling "within the scope of the authority delegated to the Commission" by the LIA. *Id.* at 611-13. Importantly, the state laws were preempted even though the Court assumed the laws were a proper exercise of police power regulating health and safety. *Id.* at 610-11. But since Congress intended "to occupy the field" in respect to all regulation of locomotive and locomotive equipment, the LIA accordingly preempted state laws within "the scope of the

---

[3] The Secretary of Transportation now holds this regulatory power.

authority delegated to the Commission." *Id.* at 611-13. Those areas include "the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 611.

Ten years later, this Court confirmed that the BIA's broad scope encompasses "[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission." *Southern Ry. v. Lunsford*, 297 U.S. 398, 402 (1936). An in-depth history of railroad, locomotive and locomotive equipment regulation is fully examined in respondents' briefs and will not be repeated here. (Resp. Br. at 3-4, 10-15.) Field preemption applies for locomotive and locomotive equipment, just as it does for other federally regulated industries like oil tankers, savings and loan institutions, national banks, and air traffic.

B. Field Preemption Of State Regulation And Common Law Tort Claims Should Be Upheld.

1. Following *Napier*, The Lower Courts Should Be Affirmed

Following the template evident in field preemption decisions from other heavily-regulated areas, this Court should affirm *Napier's* holding that Congress occupied the field of locomotive and locomotive equipment regulation. *Napier* is sound because (a) it is grounded in the Act's language

which delegates broad authority to the Secretary; (b) Congress has demonstrated its intent to occupy the field in the statutory scheme; and (c) a long history of federal authority exists in this regulated field. The details of each of these points are fully presented in respondents' brief. (Resp. Br. at 25-51.)

When the Act is read in its entirety, Congress intended to confer broad regulatory powers to the Secretary of Transportation. The breadth of Congress's delegation is the cornerstone of this Court's analysis of field preemption, as evident in each of the cases analyzed above. Just as this Court concluded that Congress extended broad federal authority to the board regulating savings and loan associations, this Court may also say of the Secretary of Transportation under the LIA: "Nowhere is there a suggestion of any intent somehow to limit the ... authority." *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 164.

This Court should reject petitioners' argument that this delegation was narrowed to mere "use" of locomotive and locomotive equipment on railroad lines. (Pet. Br. at 16, 21-23; SG Br. at 11, 13-16.) This pinched position rests an inappropriate focus on one word and is contradicted by a complete reading of the Act, which encompasses "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." 49 U.SC. § 20701. Because the Act broadly delegates federal authority over design and construction of locomotive and locomotive equipment and petitioners' claims rest

on design and construction of locomotive and locomotive equipment, the statute's reference to "use" is not a material limitation. Respondents' point is well taken: "A locomotive's design and manufacture is the same whether it is on the tracks or in the roundhouse." (Resp. Br. at 21.)

Further, Congress's intent to occupy the field is evident in the "statutory pattern," just as it was in *Ray* and *Locke*. Through numerous statutes, the LIA and BIA among them, Congress intended to promote uniformity based on national design and construction standards; this is similar to the Congressional intent recognized in *Ray* and *Locke*. In this appeal, this Court should reach the same conclusion it reached concerning tanker regulation: "Congress has left no room for state regulation of these matters." *Locke*, 529 U.S. at 91. *See also City of Burbank*, 411 U.S. at 638 ("the 1972 Act seems to us to leave no room for local curfews or other local controls").

2. State Courts Of Last Resort Have Held That Locomotive Inspection Act Preemption Bars State Tort Claims

When Congress occupies the field, "any state law falling within that field is pre-empted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). This Court also has recognized that tort claims are designed to affect conduct and regulate – just as statutes and regulations do. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("[State] regulation can be as effectively

exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.").

Numerous plaintiffs have asserted that the scope of field preemption recognized in *Napier* does not apply to their own claim, arguing as petitioners do here that preemption may apply to public regulation of railroads and locomotives but it does not include private litigation. But the majority of high state courts across the nation have rejected this assertion and upheld *Napier* preemption on the principle that federal law preempts *all* state claims – including tort claims – leaving no area within which states may act. *See, e.g., General Motors Corp. v. Kilgore*, 853 So.2d 171, 176 (Ala. 2002) (observing "A majority of courts ... have also found that the [Locomotive Inspection Act] preempts common-law actions against both locomotive operators and locomotive manufacturers"); *see also In re W. Va. Asbestos Litig.*, 592 S.E.2d 818, 823-24 (W. Va. 2003) (citing cases).

State courts must independently determine whether a state action is preempted by federal law. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988) ("[W]hen a state proceeding presents a federal issue, even a preemption issue, the proper course is to seek resolution of that issue by the state court."). Tellingly, the state courts of last resort that have been tasked with deciding whether the Locomotive Inspection Act preempts common

law actions against the operators, manufacturers, and distributors of locomotive and locomotive equipment have consistently held that the Act preempts state tort claims. *See, e.g., Darby v. A-Best Prods. Co.*, 811 N.E.2d 1117, 1125-26 (Ohio 2004); *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 822; *Kilgore*, 853 So. 2d at 171; *Scheiding v. Gen. Motors Corp.*, 993 P.2d 996, 1011-1012 (Cal. 2000).

In *Scheiding*, the California Supreme Court analyzed whether the federal preemption analysis in *Lohr* and *Silkwood* "had undermined the viability of *Napier*." 993 P.2d at 998. Based on a careful reading of this Court's precedent, the California high court confirmed that *Napier* foreclosed state law claims. *Id.* at 1000-02 ("unpersuaded on the merits" by the plaintiff's position that "in the wake" of *Medtronic* and *Silkwood* "preemption analysis has evolved to narrow the proper construction and application of *Napier*"). The high court also relied on the Ninth Circuit Court of Appeal's "practical rationale" for that determination:

> [The] broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances, with most railroad routes wending through interstate commerce. The virtue of uniform national regulation is "self evident: locomotive companies need only concern themselves with one set of equipment regulations and need not

> be prepared to remove or add equipment as they travel from state to state."

Id. at 998 (quoting *Law v. Gen. Motors Corp.*, 114 F.3d 908, 911-12 (9th Cir. 1997)) (internal quotation omitted).

Simply put, if each state were to adopt different liability standards – through legislation, regulation, or tort claims – "manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state." *Id.* at 999 (quoting *Law*, 114 F.3d at 910-911). "Either way, Congress's goal of uniform, federal railroad regulation would be undermined." *Id.*

The California Supreme Court confirmed that the field occupied "must necessarily extend to state law tort recovery" because the Locomotive Inspection Act "cannot remove 'the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances' from the purview of state regulation without concomitantly precluding tort actions premised on a defect in such design, construction, or material." *Id.* at 1001-02 (quoting *Napier*, 272 U.S. at 611). "Any other result would place regulation of these requirements in the hands of state juries, thereby constraining the Secretary of Transportation's regulatory authority and undermining the goal of uniformity." *Id.* at 1002 (citations omitted).

Following similar reasoning, a majority of state and federal courts have found that the Locomotive Inspection Act preempts common-law actions against both locomotive operators and locomotive manufacturers. *See, e.g., Forrester v. Am. Dieselelectric*, 255 F.3d 1205 (9th Cir. 2001) (common-law product liability action against manufacturer); *Oglesby v. Delaware & Hudson Ry.*, 180 F.3d 458 (2d Cir. 1999) (common-law failure to warn claim); *Springston v. Consol. Rail Corp.*, 130 F.3d 241 (6th Cir. 1997) (common-law negligence claim for inadequate warning devices); *Roth v. I & M Rail Link, L.L.C.*, 179 F. Supp. 2d 1054 (S.D. Iowa 2001) (state common-law tort claims against manufacturer); *Bell v. Ill. Cent. R.R.*, 236 F. Supp. 2d 882 (N.D. Ill. 2001) (same); *In re: Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993*, 188 F. Supp. 2d 1341 (S.D. Ala. 1999) (common law negligence and design-defect claims); *Seaman v. A.P. Green Indus., Inc.*, 707 N.Y.S.2d 299 (Sup. Ct. 2000) (common-law claims against manufacturers of train components containing asbestos); *see also Darby*, 811 N.E. 2d at 1125-26; *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 822; *Kilgore*, 853 So. 2d at 180.

3. Modern Preemption Jurisprudence Does Not Diminish *Napier's* Viability

Silkwood and *Lohr* undermine neither the viability nor the applicability of *Napier* to preempt state tort claims.

In *Silkwood*, this Court held that the Atomic Energy Act did not preempt state-law tort remedies because the federal legislation made clear that "persons injured by nuclear accidents were free to utilize existing state tort remedies." 464 U.S. at 251-52. The statutory language, therefore, made it plain that "Congress was quite willing to accept" the regulatory affect of tort law on radiation safety. *Id.* at 256. But nothing in *Silkwood* allows state tort law to intrude when a statute contains no evidence that Congress was willing or intended that state common-law remedies would be preserved. To the contrary, *Silkwood* confirms the rule that applies to petitioners' claim in this case: when Congress occupies a field, "any state law" in the field is preempted. *Id.* at 248.

Similarly, *Lohr* involved an express preemption provision contained in the Medical Device Amendments of 1976 ("MDA") and this Court's holding turned on the scope of preemption that Congress expressed in that clause – not on the distinction between tort law and other laws. Construing the provision according to its terms, the Court found no congressional intent to preempt state common-law negligence actions. *Lohr*, 518 U.S. at 491 ("If Congress intended such a result, its

failure even to hint at it is spectacularly odd, particularly since Members of both Houses were acutely aware of ongoing product liability litigation."). The preemption clause specified that the federal act would preempt state law only if there were an on-point federal regulation. *Id.* at 496. Thus, common law negligence suits were exempted from preemption under the MDA because the federal agency with authority to do so had not imposed any such regulation. *Id.* at 496-97.

Lohr's analysis, however, is not applicable to the LIA which commands national uniformity, preempts the field of locomotive design and construction, and preempts state law within the field. The LIA preempts state action whether or not there is an on-point federal regulation; indeed, whether a federal regulation exists is "without legal significance." *Napier*, 272 U.S. at 613. Importantly, since *Silkwood* and *Lohr*, this Court has repeatedly held that ordinary preemption principles apply to common-law damage actions. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868-69 (2000) (holding common law products liability claim preempted); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-23 (1992) (common law failure to warn claims preempted); *Easterwood*, 507 U.S. at 664, 675 (FRSA preempts common law claim related to speed of train); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 358 (2000) ("FRSA preempts respondent's state tort claim"). Consequently, preemption of a common law claim turns on the scope of authority delegated by Congress.

II. EROSION OR ABANDONMENT OF FIELD PREEMPTION WOULD FLOUT STARE DECISIS AND DESTROY SETTLED ECONOMIC EXPECTATIONS.

Field preemption is by now a jurisprudential truth that informs countless business decisions every day, as it has for many decades. Congress has always had the power to eliminate or narrow the scope of field preemption merely by amending the laws this Court has deemed to occupy the field. Yet lawmakers have stood by this Court's application of the field preemption doctrine. The time-honored principle of stare decisis exists to protect centuries-old expectations and understandings. Neither petitioners nor the Solicitor General have made the case for the dramatic departure from precedent that they demand.

A. Stare Decisis Is Fundamental And Must Be Preserved.

Stare decisis ensures that "the law will not merely change erratically" and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). This Court has held that "stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*,

491 U.S. 164, 172 (1989) (quoting *The Federalist*, No. 78, at 490 (A. Hamilton) (H. Lodge ed. 1888)).

This doctrine is of fundamental importance to the rule of law and "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) ("[T]he doctrine of stare decisis is of fundamental importance to the rule of law."). Plainly stated, adherence to precedent "reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than it be settled right." *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997). Consequently, reconsideration of decisions must be approached "with the utmost caution." *Id.*; *see also Agostini v. Felton*, 521 U.S. 203, 235 (1997).

Adhering to stare decisis is particularly compelling in the realm of field preemption which is based on "a scheme of federal regulation so pervasive" it gives rise to "the inference that Congress left no room for the States to supplement it." *Rice*, 331 U.S. at 230. *See, e.g., Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252, 260 (1964) (state could not prohibit organized labor conduct that Congress had contemplated but not regulated because state law could "upset the balance of power ... expressed in our national labor policy"). Stare decisis weighs especially "heavily in the area of statutory

construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Ill.*, 431 U.S. 720, 736 (1977). This Court affords deference to

> longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes. Adherence to precedent is, in the usual case, a cardinal and guiding principle of adjudication, and "[c]onsiderations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."

California v. Fed. Energy Reg. Comm'n, 495 U.S. 490, 498-99 (1990) (quoting *Patterson*, 491 U.S. at 172-73); *see also Hilton v. S. Car. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) ("Congress has had almost 30 years in which it could have corrected our decision in *Parden* if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding. *Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response. This is so in the case before us.").

Other than wishing for an opposite rule, petitioners offer no sound basis for departing from the field preemption doctrine that has governed so long. Yet, "special justification" must be shown for the extraordinary abandonment of long-standing doctrine. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("[A]ny departure from the doctrine of stare decisis demands special justification."). Indeed, the Court must be presented with "the most convincing of reasons [which] demonstrate[ ] that adherence to it puts us on a course that is sure error." *Citizens United v. Fed. Election Comm'n*, -- U.S. --, 130 S. Ct. 876, 911-12 (2010).[4] To contrast, this Court has held that the extraordinary act of revising its precedent "is particularly appropriate where, as

---

[4] For other examples of the high burden imposed to overturn existing prudent or long-standing legal doctrines, see *also Amalgamated Ass'n of St., Elec., Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 302 (1971) ("While we do not assert that the *Garmon* doctrine is without imperfection, we do think that it is founded on reasoned principle and that until it is altered by congressional action or by judicial insights that are born of further experience with it, a heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon* and set out again in quest of a system more nearly perfect. A fair regard for considerations of *stare decisis* and the coordinate role of the Congress in defining the extent to which federal legislation pre-empts state law strongly support our conclusion that the basic tenets of *Garmon* should not be disturbed."); *Hilton*, 502 U.S. at 202 ("Time and time again, this Court has recognized that the doctrine of *stare decisis* is of fundamental importance to the rule of law. ... Adherence to precedent promotes stability, predictability, and respect for judicial authority. ... For all of these reasons, we will not depart from the doctrine of *stare decisis* without some compelling justification.") (quotation marks and citations omitted).

here, a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). Field preemption does not fit within this extremely narrow construct. Stare decisis compels preservation of field preemption.

B. Field Preemption Has Resulted In Reasonable And Settled Industry Expectations.

Affirming *Napier* is particularly sound in this case. Field preemption is not a new doctrine; it dates back to the first half of the nineteenth century. *See, e.g.*, *Prigg v. Pennsylvania*, 41 U.S. 539, 617-18 (1842) ("For if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be, that the state legislatures have a right to interfere, and as it were, by way of compliment to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose."); *see also Houston v. Moore*, 18 U.S. 1, 24 (1820) ("Congress has exercised the powers conferred on that body by the constitution, as fully as was thought right, and has thus excluded the power of legislation by the States on these subjects, except so far as it has been permitted by Congress[.]").

Since the 1800s, nationally regulated industries have made business decisions, created designs, manufactured equipment, parts, and products, and run companies with the idea that federal law governs their conduct. State, county or municipal interference with the federally regulated businesses has not been allowed because Congress left no room in the field. *See, e.g., Rice*, 331 U.S. at 236 (field of regulating federally licensed grain elevators is preempted due to congressional intent to eliminate dual regulation of the industry); *City of Burbank.*, 411 U.S. at 633, 638 (Federal Aviation Act preempts local ordinance limiting overnight flights due to "the pervasive nature of the scheme of federal regulation of aircraft noise...leav[ing] no room for local curfews or other local controls").

Continuing application of field preemption in areas where national uniformity has ruled supreme is critical to the success of affected businesses and the country's economy. This Court should not lightly undertake to upset settled expectations by allowing state action through tort jury verdicts to interfere with business decisions that occurred decades ago in reliance on federal regulations and oversight. The business "reliance interests are important considerations in property and contract cases, where parties have acted in conformance with existing legal rules in order to conduct transactions." *Citizens United*, -- U.S. --, 130 S. Ct. at 913; *see also Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Federally regulated industries, which, by their very nature, are interstate enterprises have relied on the field preemption doctrine in making business decisions. *See City of Burbank*,

411 U.S. at 638-39 ("interdependence of factors [at issue in air traffic regulation] requires a uniform and exclusive system of federal regulation.").

The long-standing effects of field preemption are felt across the country every day, and decisions made long ago in the regulatory light of field preemption continue to have life today. For example, the engineering and business decisions regarding design and construction of locomotive or locomotive equipment, tanker vessels or tanker equipment, were made decades ago with the understanding that federal law governed the conduct of those decisions. To allow 50 different state legislatures or, worse, thousands of diverse juries empanelled in various counties throughout the country, to impose standards different from the federal law would sunder the national uniformity that these industries depend upon. *See, e.g.*, 49 U.S.C. § 20106 (Congress precludes state law interference with railroad oversight to ensure "[n]ational uniformity of regulation"); 46 U.S.C. § 391a(1)(3) (Congress requires promulgation of "comprehensive minimum standards" for oil and fuel tankers).

A similar Congressional intent favoring national uniformity is present for savings and loan institutions, national banks, and air traffic. *See, e.g.*, 12 U.S.C. § 1464(a)(1) (Congress authorizes board to prescribe rules and regulations for the operation of savings and loan institutions); 12 U.S.C. § 371(a) (Congress authorizes national banking associations to engage in mortgage lending subject to restrictions by federal agency); 49 U.S.C.

§ 1348 (Congress authorizes FAA to regulate use of navigable airspace "in order to insure the safety of aircraft and the efficient utilization of such airspace"). Upending field preemption will call into question the vibrancy of the Congressional intent underlying these acts and will send ripples across the thousands of business decisions made in reliance upon that intent. Such uncertainty could have devastating consequences with economic ramifications which this Court cannot predict.

Abandoning field preemption is distinctly different from changing a course established by an opinion that is merely a decade or two old, where this Court has held expectations would not be upset. *See Montejo v. Louisiana*, -- U.S. --, 129 S. Ct. 2079, 2088-89 (2009). Unlike in *Montejo*, field preemption has governed since the early 1800s and federally regulated businesses and industries have made countless decisions based upon the premise that federal law, regulations, and agency discretion defines fundamental parameters for the entire industry. Field preemption cannot be cast aside without doing substantial harm to the established legal framework within which businesses and industries operate.

C. This Court Should Preserve Field Preemption.

Given the long-settled acceptance of field preemption as attendant to broad federal legislation and regulation, the question posed by petitioners implicates not only the Court's faith in its own precedent but also the supremacy of

Congress's decision not to alter the federal regulatory schemes that generated those very opinions. Recognizing that *Napier* was decided in 1926, Congress has had ample opportunity to change the scope of preemption for locomotive and locomotive equipment design and construction, as well as many other fields that this Court has recognized as being occupied by the federal law and regulation.

The fact that Congress has not significantly revised these statutes or expressly limited preemption by authorizing common law claims "may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply, and in any event, the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict[.]" *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387-88 (2000). Field preemption cannot be overturned or compromised without deconstructing the understanding upon which Congress has based legislation. This case presents no just cause to engage in such a tear down of precedent that has been so important to business and industry.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Dated: October 7, 2011.

Diane B. Bratvold
Kevin M. Decker
Jonathan P. Schmidt
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
(612) 977-8400
dbratvold@briggs.com

R. Matthew Cairns
Counsel of Record
PRESIDENT, DRI
55 W. Monroe, Suite 2000
Chicago, IL 60603
(312) 795-1101
cairns@gcglaw.com

ATTORNEYS FOR AMICUS CURIAE DRI—VOICE OF THE DEFENSE BAR

AMICUS CURIAE BRIEF

No. 10-879

IN THE
Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, *ET AL.*,
Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* GENERAL ELECTRIC CORPORATION IN SUPPORT OF RESPONDENTS

Paul D. Clement
Counsel of Record
Nicholas J. Nelson
BANCROFT PLLC
1919 M Street, N.W.,
Suite 470
Washington, D.C. 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for amicus curiae
General Electric Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. The LIA Preempts Regulation of All Locomotives in Interstate Commerce, Not Just While They Are "In Use" 6

A. The Government Misreads *Napier* and Misunderstands the Preempted Field 7

B. The Government's Constricted View of the Preempted Field Has No Support in the Text of the LIA or the Case Law Interpreting It 9

1. The Text of the LIA Provides No Support 9

2. *Napier* and Near-Unanimous Lower-Court Authority Reject the Government's View 11

C. The Government's Proposed Hybrid Approach Is Doctrinally Incoherent 15

D. The Government's Approach Ignores The Practical Realities of Locomotive Manufacture and Operation 21

E. Locomotive Manufacturers Have Significant Reliance Interests in the Faithful Application of *Napier* 25

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Allied-Signal, Inc. v Dir., Div. of Taxation,
504 U.S. 768 (1992) 27

Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta,
458 U.S. 141 (1982) 17

Frastaci v. Vapor Corp.,
70 Cal Rptr. 3d 402
(Cal. Ct. App. 2007) 14

Lorincie v. S.E. Pa. Transp. Auth.,
34 F. Supp. 2d 929 (E.D. Pa. 1998) 15

Napier v. Atlantic Coast Line Rail Co.,
272 U.S. 605 (1926) ..... *passim*

Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas,
489 U.S. 493 (1989) 10, 11

Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,
461 U.S. 190 (1983) 17

Quill Corp. v. North Dakota ex rel. Heitkamp,
504 U.S. 298 (1992) 27

Ray v. Atl. Richfield Co.,
435 U.S. 151 (1978) 19

Seaman v. A.P. Green Indus., Inc.,
707 N.Y.S.2d 299
(N.Y. Sup. Ct. 2000) 14

Springston v. Consol. Rail Corp.,
863 F. Supp. 535 (N.D. Ohio 1994)
aff'd, 130 F.3d 241 (6th Cir. 1997) 15

United States v. Locke,
529 U.S. 89 (2000) 18, 19

STATUTES

49 C.F.R. § 229.21 10
49 C.F.R. § 229.23(a) 10
49 C.F.R. § 229.25 10
49 C.F.R. § 229.27 10
49 C.F.R. § 229.29 10
49 C.F.R. § 229.31 10
49 C.F.R. Part 229(B) 10
49 C.F.R. Part 230 10
49 U.S.C. § 20701 ..... 1, 10
49 U.S.C. § 20702(a)(2 9
49 U.S.C. § 20702(a)(3) 9
49 U.S.C. § 20702(c) 10
49 U.S.C. § 20702(d) 10

OTHER AUTHORITIES

ICC, *Inspection of Locomotive Boilers: Report of the Comm'n to the Senate*,
73 I.C.C. 761 (Aug. 29, 1922) 14

INTEREST OF *AMICUS CURIAE*

This case concerns the preemptive scope of the federal Locomotive Inspection Act ("LIA"), 49 U.S.C. § 20701 *et seq.*, which regulates the design, construction, and materials of locomotives and locomotive equipment used in interstate commerce, and the continuing vitality of this Court's decision in *Napier v. Atlantic Coast Line Rail Co.*, 272 U.S. 605, 611 (1926), which interpreted the LIA to preempt the field. Petitioners and the United States as amicus curiae argue for a dramatic contraction of the field preempted by the LIA. The United States in particular argues for a convoluted regime that would create both doctrinal confusion and practical difficulties given the realities of locomotive manufacture and repair. General Electric Corporation, through its subsidiary GE Transportation, is the world's leading manufacturer of diesel-electric locomotives, and accounts for 70% of the United States locomotive market.[1] As such, General Electric has a unique perspective on the practical difficulties created by the proposed contraction of the field preempted by the LIA and *Napier*. Moreover, because most locomotive manufacturers, parts makers, and railroads have suffered serious solvency problems or even filed for bankruptcy in recent years, in many cases General Electric will be among the few remaining potential defendants. As such, General Electric has particular concerns about a rule that would retroactively

---

[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus* and its counsel has made a monetary contribution to the preparation and submission of this brief. All parties consent to the filing.

impose failure-to-warn liability on locomotive manufacturers in ways that upset settled expectations that arose under *Napier* and as a practical matter are incompatible with the uniformity demanded by the LIA.

INTRODUCTION AND SUMMARY OF ARGUMENT

Nearly ninety years ago, this Court recognized that Congress's broad authorization to regulate one of the most important "instrumentalities of interstate commerce" in the LIA broadly preempts the field of locomotive safety. In particular, this Court held that the LIA preempts any effort by the states to regulate "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611. The Court specifically rejected the states' argument that their regulations should escape preemption because they sought "to prevent sickness and disease due to excessive and unnecessary exposure," *id.* at 612, and not to regulate the design of locomotives for purposes of ensuring their safety in use. Thus, for nearly ninety years, companies like General Electric have manufactured locomotives to comply with federal law and with the settled expectation that *Napier* would permit them to focus on uniform federal standards, not on the competing laws of the multitude of states through which a locomotive might travel during its long useful life. The state law claim here, for injuries allegedly caused by "excessive and unnecessary exposure" to the presence of asbestos in materials used to produce a locomotive, falls comfortably within the preemptive rule of *Napier*.

The United States as *amicus curiae* proposes upsetting this settled landscape and proposes a significant change in this Court's approach to the LIA. The government argues that the LIA "does not apply to locomotives that are non-operational, such as locomotives undergoing repairs at a maintenance facility," and therefore that claims arising from injuries allegedly caused in repair shops by defective locomotives or locomotive parts are not within the preempted field. U.S. Br. at 11. This is an alarming proposal. It is both impractical and unprecedented. Manufacturers must design and produce locomotives knowing that they will be both operated and subjected to maintenance across the country. Providing field preemption in one circumstance but not in the other makes neither doctrinal nor practical sense. The design does not and cannot change when the locomotive enters the repair yard.

The government recognizes, *id.* at 23–24, that its proposed restriction of the scope of the preempted field threatens the uniformity demanded by the LIA. Locomotives must be manufactured with full knowledge that they will be both operated and repaired. Thus, if states were free to regulate the design, construction, and material of locomotives whenever they are at rest in the repair yard, then as a practical matter the states could impose multifarious requirements on the design and manufacture of this instrumentality of commerce.

Recognizing this problem with its proposed contraction of *Napier*'s field preemption holding, the United States assures that implied conflict preemption will fill the gap and prevent states from unduly interfering with the federal policy of

uniformity. That proposal invites both doctrinal confusion and practical uncertainty. Rather than apply the straightforward rule of *Napier*, courts would need to assess first whether the claim was within or without the preempted field, and if the latter, then determine whether the state law claims "amoun[t] to" an assertion "that a locomotive containing such parts is not safe to operate," which would then "stand as an obstacle to achievement of the LIA's uniformity purpose." *Id.* at 12; *see also id.* at 24 (suggesting obstacle preemption of state tort rules that "have the effect of prescribing rules about whether a locomotive is fit for use").

Applying this novel theory of narrow-field-supplemented-with-conflict preemption, the United States suggests that state tort rules prohibiting the use of asbestos in locomotive parts should be preempted, because they "would undermine the uniformity-of-regulation objective of the LIA," *id.* at 25, but that failure-to-warn claims based on the use of asbestos should not be preempted, "because they would not require manufacturers of locomotives or railroads to alter the design or construction of their locomotives." *Id.* at 26. In other words, the government would superimpose a distinction between failure-to-warn and design defect claims on its manufactured distinction between field preempted "in-use" claims and presumptively unpreempted "at-rest" claims.

This approach has nothing to recommend it. For one thing, it directly conflicts with this Court's decision in *Napier*, which expressly rejected an invitation to have preemption turn on the purpose of the state regulation in favor of a clear test of

whether the state law "operate[s] upon the same object" as the LIA—the locomotive itself. 272 U.S. at 612. In the context of such a classic instrumentality of interstate commerce, the rule could hardly be otherwise. The need for a uniform federal rule stems from the fact that a locomotive is manufactured once and then moves through multiple states. Disparate regulation of the object creates problems without regard to the purpose behind the regulation. Moreover, the strange hybrid of field and conflict preemption proposed by the government finds no support in the text of the LIA or interpretations thereof. The LIA does not limit its regulation to locomotives in use while leaving the field of repair and inspection to the states. To the contrary, as its name suggests, the LIA and its implementing regulations deal with locomotive inspection and repair in great detail. Moreover, the government prescribes regulatory warnings of its own, which underscores that matters of both proper design and adequate warnings lie within the preempted field. The distinction also ignores the practical realities of the industry. Indeed, to the extent the government's convoluted theory is an elaborate effort to carve out failure-to-warn claims, those claims raise the same problems that fully justify the preemption of other state tort claims.

Finally, the government's proposed rule creates doctrinal confusion at the expense of the reliance interests of locomotive manufacturers. The law of preemption is confusing enough without creating a new hybrid category of partial field preemption with a conflict preemption overlay. The far better course is to preserve the rule of *Napier*. Generations of

locomotives have been put on the tracks based on the assumption that uniform federal rules governed the locomotives when both in-use and at-rest in the repair yard. There is absolutely no justification for replacing that stable rule with a convoluted preemption regime that only a lawyer could love.

ARGUMENT

I. THE LIA PREEMPTS REGULATION OF ALL LOCOMOTIVES IN INTERSTATE COMMERCE, NOT JUST WHILE THEY ARE "IN USE."

Napier contradicts the government and Petitioners' argument that the LIA only applies when locomotives are "in use," and that its preemptive force vanishes as soon as they are taken offline. The LIA regulates nouns, not verbs, and its requirements attach to locomotives themselves, not merely to the active use of those locomotives. Accordingly, the field preempted by the LIA "extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611.

The government's position ignores not only this holding of *Napier*, but also the basic realities about *how* locomotives are designed and manufactured for safe use: the design and manufacture can be done only once, and obviously will determine the characteristics of the locomotive both when it is being used and when it is being repaired. Locomotives are the classic instrumentality of commerce. They demand the uniform rule that *Napier* provides.

A. The Government Misreads *Napier* and Misunderstands the Preempted Field.

The United States recognizes that *Napier* is a longstanding precedent of this Court that holds that the LIA preempts the field of locomotive safety. The government at least implicitly recognizes that principles of *stare decisis* command respect for such a well-established statutory decision of this Court. Nothing about *Napier* has proven unworkable or doctrinally problematic or otherwise has provided any justification for reconsideration. But rather than ask this Court to overturn *Napier*, the government invites this Court to eviscerate *Napier* by drastically cutting back on the field that *Napier* held to be preempted. This Court should reject this invitation to overrule *Napier* through the back door.

The government suggests that the key to understanding *Napier* and field preemption is that the scope of preemption and the scope of the regulable field are co-extensive. While that proposition is correct, there are two fundamental problems with the government's application of that principle. First, the government misdescribes the field in which the LIA authorizes federal regulation. The Locomotive Inspection Act, as its name suggests, regulates locomotives and locomotive equipment, and does so when they are at rest subject to inspections and repairs and not just when they are in use. The government's effort to reimagine the preempted field as a narrow one that excludes locomotives when they enter the repair yard simply has no support in the text of the LIA. Second, and equally important, the government's view is

unfaithful to this Court's decision in *Napier*, which expressly addressed the preempted field.

The extent to which *Napier* controls this case cannot be over-emphasized. The tort claim here is based on unnecessary exposure to asbestos from the materials in the locomotives during their repair. *Napier* described the preempted field as "the design, the construction, and the material of every part of the locomotive and tender and all its appurtenances." 272 U.S. at 611. The states in *Napier* suggested that they could regulate locomotives for different purposes than those that animated the federal law. While the federal law was said to be focused on the safety of locomotives in use, state law was said to "endeavo[r] to prevent sickness and disease due to excessive and unnecessary exposure." *Id.* at 612. The Court rejected that argument on the ground that both state and federal law focused on the same object: the locomotive itself. Under those circumstances, it did not matter whether the laws had different purposes or whether the federal government had exercised its regulatory power—a federal law controlled. Simply put, *Napier* controls this case.

Moreover, because this case turns on the scope of *Napier*, this Court owes no special deference to the views of the government. Indeed, even the government does not claim any entitlement to deference, and for good reason. This Court is obviously in a better position than the executive branch or anyone else to determine the scope of the Court's decision in *Napier*.

B. The Government's Constricted View of the Preempted Field Has No Support in the Text of the LIA or the Case Law Interpreting It.

1. The Text of the LIA Provides No Support.

The government's position appears premised on the assumption that in the LIA Congress somehow limited the field of federal concern to locomotives that are in active use, and that repair yards therefore are an "LIA-free zone." That is fundamentally wrong on at least two levels.

First, the LIA's primary concern is with the locomotives themselves as instrumentalities of interstate commerce. The LIA works to ensure that those instrumentalities are safe. While locomotives have their most obvious capacity to be unsafe when they are moving at high speeds while in active use, that is not the exclusive or even primary focus of the LIA. The LIA regulates the locomotives as nouns, rather than regulating the verb of active interstate use of the rails.

Second, and fully consistent with the congressional intent to ensure that these instrumentalities are safe for use, the LIA actively regulates locomotives when they are not in active use, but are in the inspection or repair yard. The LIA is, after all, an *inspection* act—along with prohibiting use of locomotives that are unsafe, it requires the Secretary of Transportation to "inspect every locomotive and tender and its parts and appurtenances" and to mandate that railroads do the same, and repair any defects discovered. 49 U.S.C. § 20702(a)(2) & (3). Railroads must also keep records of all inspections

and repairs, *id.* § 20702(c), and cannot change their inspection procedures without approval by the Secretary, *id.* § 20702(d). The LIA prohibits the use of locomotives not inspected or repaired according to the Secretary's regulations. 49 U.S.C. § 20701(2) & (3).

Pursuant to this authority, the Department of Transportation has promulgated detailed regulations governing locomotive inspection and repair. *See generally* 49 C.F.R. Part 229(B); *see also id.* Part 230 (same, for steam locomotives). Most locomotives must be inspected on a daily basis, and conditions that do not comply with the host of substantive regulations promulgated under the LIA must be repaired and reported. *Id.* § 229.21. More in-depth inspections must occur at least every 92 days, *id.* § 229.23(a), during which a locomotive must undergo a series of tests described in great detail in the regulations, *see id.* § 229.25. Further sets of prescribed repairs and inspections must be conducted annually, *id.* § 229.27, and biannually, *id.* § 229.29 & 31. In other words, when a locomotive sits in the repair yard—that is, at the very moment when the government and petitioners claim it is somehow outside the field regulated by the LIA—it is very often there because the LIA requires it. The locomotive is undergoing inspections and repairs required under the LIA, in a manner governed by the LIA, using parts that are required or permitted under the LIA.

The government relies on *Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*, 489 U.S. 493, 510–22 (1989), as authority for its narrow conception of the preempted field. But

decisions interpreting other statutory schemes provide little help in interpreting the field preempted by the LIA. Indeed, the differences between the LIA and the statute at issue in *Northwest Central* only underscore the problems with the government's miserly view of the field preempted by the LIA and *Napier*. *Northwest Central* involved the federal Natural Gas Act, which governs many aspects of the sale and distribution of natural gas, but "expressly carves out a regulatory role for the States" in matters regarding "intrastate transportation, local distribution, and distribution facilities, and over the production or gathering of natural gas." *Id.* at 507 (internal quotation marks omitted). In limiting the scope of the field preempted by the Act, the Court simply interpreted it not to intrude on the state authority expressly carved out in the Act. *See id.* at 512–14. There is nothing remotely like such a carve-out in the LIA. Instead, as noted, the inspection and repair process is an integral part of the federal scheme and not some area of especial state concern.

2. Napier *and Near-Unanimous Lower-Court Authority Reject the Government's View.*

The biggest obstacle to the government's effort to recast *Napier* as recognizing only a narrow field of preemption is *Napier* itself. The government proposes to define the field preempted by the LIA not by the physical objects being regulated—locomotives and their parts and appurtenances—but instead by the *purpose* of the statute, which the government asserts is the safety of in-use locomotives. It thus maintains that state

regulations of locomotives that pursue *other* purposes—here the safety of the repair yard and the locomotive while being repaired—should not come within the preempted field. As noted, this is exactly the approach that this Court considered and rejected in *Napier*. There, "[t]he argument mainly urged by the states in support of the claim that Congress has not occupied the entire field, [was] that the federal and the state laws [were] aimed at distinct and different evils." 272 U.S. at 612–13. *See also* Br. for Def. In Error, *Chi. & N.W. Ry. Co. v R.R. Comm'n of Wisc.*,[2] Nos. 310 & 311 (U.S. Oct. 12, 1926), at 30–31 (in subsection entitled "Object sought by legislation rather than physical elements affected by legislation determines field entered by Congress," arguing that "[t]he clash between federal and state legislation does not come about because they affect the same object. It comes about when the state legislation tends to or does interfere with the full fruition of the federal policy, and as is demonstrated by the facts of this case, it is entirely possible for state legislation to affect the same object that is affected by federal legislation, and still have both stand if they are aimed at different evils."); Br. of Appellant, *Napier*, No. 87 (U.S. 1925), at 31 (contending that ICC's authority extended only to requiring equipment "necessary to carry out the purpose of the Act, namely, safety in operation"); *id.* at 34 ("[T]he Federal Boiler Inspection Act covers and is limited to the field of inspection to promote safety in operation,

---

[2] This Court considered *Napier* and *Chicago and Northwestern* on a consolidated basis, and its opinion covered both cases. *See Napier*, 272 U.S. at 607.

and . . . this does not occupy the entire field of regulation.").

This Court, however, declined to adopt a purpose-oriented approach to preemption, instead expressly holding that preemption applied because "[t]he federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object." *Napier*, 272 U.S. at 612. Especially when that object is a classic instrumentality of interstate commerce, the decision in *Napier* makes perfect sense and in no way suggests that states can regulate that object for some other purpose.

The government stresses *Napier*'s acknowledgement that the LIA regulates locomotives "used on a highway of interstate commerce," claiming that this demonstrates that the statute's field-preemptive scope extends only to state rules directed at in-use locomotive safety. U.S. Br. at 16 (emphasis omitted) (quoting *Napier*, 272 U.S. at 607). But this language does not support the government's distinction in the least. The *Napier* Court did not describe the LIA as regulating the use of locomotives in interstate commerce or locomotives while in use. Neither description would have been accurate. Instead, the Court clarified that the objects of the regulation were instrumentalities of interstate commerce, *i.e.*, locomotives "used on a highway of interstate commerce," even if operated exclusively within a single state, because the rail system itself was a highway of interstate commerce. The repair yards too are part of that system. More to the point, nothing in that passage remotely suggested that only locomotives in active use could

be reached by the federal scheme. To the extent the passage has any relevance it suggests the contrary.[3]

Almost every state and federal court to consider the issue has read *Napier* in just this way—*i.e.*, that the field preempted by the LIA must be defined not by the statute's purpose but by the object that it regulates. *See Frastaci v. Vapor Corp.*, 70 Cal Rptr. 3d 402, 411 (Cal. Ct. App. 2007) (rejecting claim arising from asbestos exposure during locomotive repair because "[t]here is no indication Congress intended the BIA's broad preemptive scope to be circumscribed by the location of the locomotive. Rather, the BIA is directed at the *subject* of locomotive equipment, which is peculiarly one that calls for uniform law.") (internal quotation marks and ellipsis omitted); *Seaman v. A.P. Green Indus., Inc.*, 707 N.Y.S.2d 299, 302 (N.Y. Sup. Ct. 2000) ("It is . . . irrelevant whether the plaintiff was exposed to asbestos from locomotives in use or 'off-line,' because

---

[3] The government's effort to rely on an early regulatory statement suffers from the same basic flaw. The government attempts to draw support for its position from the Interstate Commerce Commission's 1922 statement that "it is the 'use' of a locomotive not found to be in proper condition and safe to operate, and not the condition itself, which is a violation of the law." U.S. Br. at 15 (quoting ICC, *Inspection of Locomotive Boilers: Report of the Comm'n to the Senate*, 73 I.C.C. 761, 763 (Aug. 29, 1922)). But the government's reliance on that statement conflates the regulatory violation with the regulated field. It may be that a violation of the Act required use in an unsafe state, and it did not create an inchoate violation when a locomotive sat on the repair yard in an as-yet unrepaired state. But that does not mean that the unrepaired, yet stationary locomotive was not within the regulated field. It certainly was, as evidenced by the fact that federal law prohibited its use unless and until it was repaired.

a locomotive's design, construction, parts and materials, which are regulated by the BIA, are the same whether or not the locomotive is in use."); *Lorincie v. S.E. Pa. Transp. Auth.*, 34 F. Supp. 2d 929, 932 (E.D. Pa. 1998) ("[T]he plaintiffs in *Napier* sought specifically to distinguish between the BIA's purpose (railroad safety) and the purpose of the state regulations (engineer health and comfort)," but this Court "held such a distinction insignificant."); *Springston v. Consol. Rail Corp.*, 863 F. Supp. 535, 541 (N.D. Ohio 1994) ("[T]he very language of the *Napier* opinion refutes plaintiff's argument that because the purpose of the BIA was to protect railroad employees rather than bystanders, plaintiff's state law tort claims are not preempted. . . . [I]t is not the purpose of locomotive requirements that is important."), *aff'd*, 130 F.3d 241 (6th Cir. 1997).

C. The Government's Proposed Hybrid Approach Is Doctrinally Incoherent.

The government recognizes that simply constricting the field preempted by *Napier* would not work. If implemented in isolation, this narrowing of the LIA's preemptive scope would allow the states to regulate every aspect of the design, manufacture and materials used in locomotive equipment production in the name of ensuring the locomotives' safety while at the repair yard. That result would severely burden interstate commerce and entirely frustrate the purpose of uniform federal regulation of these instrumentalities of commerce. To avoid this scenario, the government proposes that the newly-restricted LIA field preemption be supplemented with a dose of previously-unnecessary conflict preemption

that would prevent most state regulation—with the exception, we are told, of most failure-to-warn claims. Under the government's novel two-steps-backward-one-step-forward approach, courts would first determine whether a state tort suit or regulation implicated the regulated field. If not, the government would then have the courts ask whether the state law "would have the effect of prescribing rules about whether a locomotive is fit for use." U.S. Br. at 24. Laws that had this effect would, in the government's view, be conflict preempted by the LIA, because if there were "different rules in different States regarding locomotives' fitness for service," this would "undermine one of the important objectives of the LIA." *Id.* This effort to superimpose conflict preemption on field preemption is doctrinally incoherent.

The government does not mean to supplement field preemption with a demanding form of obstacle preemption such that in the repair yard states would have a relatively free hand to regulate absent a direct conflict between an on-point federal regulation and the state law. To the contrary, the government seems to envision a form of conflict preemption broad enough to prevent almost any effort by states to regulate locomotive design in the name of repair yard safety. For instance, although there currently is no federal regulation either prohibiting or expressly permitting the use of asbestos in locomotives, the government asserts that state-law rules restricting the presence of asbestos in locomotive parts nevertheless should be conflict preempted by the LIA "even if [they] arose in a claim concerning an asbestos-related injury sustained

while a locomotive was in a repair shop," because allowing such claims "would undermine the uniformity-of-regulation objective of the LIA." U.S. Br. at 25.

That result, while perfectly sensible, is practically indistinguishable from the field preemption the government says it does not want. Field preemption arises "from a 'scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it.'" *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) (quoting *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)). When it comes to the design of locomotives, this seems to be exactly what the government wants. But embracing *Napier*'s broad field preemption over locomotive design, construction and materials interferes with the government's evident desire to preserve some failure-to-warn claims. The government (correctly) recognizes that field preemption over the broader field recognized by *Napier* would render such claims preempted. But the government's apparent interest in preserving failure-to-warn claims does not justify reverse engineering a rule of preemption that produces such profound doctrinal confusion. Preemption law is difficult enough without creating some new hybrid to preserve failure-to-warn claims that are clearly within the field preempted by *Napier* and implicate all of the same concerns as the state laws the government acknowledges to be preempted. See Part I.D., *infra*.

In contrast to the relative simplicity of the *Napier* rule, the government's novel hybrid approach would

create difficulties for the courts in determining whether a given provision of state law comes within the preempted field or instead is subject to the "uniformity obstacle preemption" the government proposes. According to the government's own descriptions, a court facing this inquiry would be required to decide whether the statute "regulat[es] locomotive equipment used on a highway of interstate commerce," U.S. Br. at 12 (quoting *Napier*, 272 U.S. at 607), so as to be field preempted, or instead merely would interfere with Congress's "purpose of imposing uniform national standards on common carriers," *id.* at 23, so as to implicate only conflict preemption. The government itself gives little sense of how this rather metaphysical distinction should be made.

Another doctrinal difficulty with the government's position is that it requires the same statutory text to project both a limited preempted field and an additional fairly broad realm of conflict preemption. That is a great deal to ask of a single statutory provision.

The government cites *United States v. Locke*, 529 U.S. 89 (2000), as a purported precedent for the proposition that a single statute can give rise to both a preempted field and obstacle preemption outside that field. U.S. Br. at 23. But *Locke* does not help the government, because it involved field preemption and obstacle preemption that arose from *different provisions* of a statute, regulating different matters. In *Locke*, this Court noted that the Ports and Waterways Safety Act features "two somewhat overlapping titles, both of which may . . . preclude enforcement of state laws, though not by the same

pre-emption analysis." 529 U.S. at 101. Specifically, Title II requires the Coast Guard to regulate the various aspects of marine vessel design, construction, and maintenance, and gives rise to field preemption, whereas Title I merely *authorizes* Coast Guard regulations of vessel traffic and environmental safety, and gives rise only to conflict preemption. *Id.* at 101, 111–12. The Court expressly noted that Title II's field preemptive effect resulted from the fact that "[a] state law in this area . . . would frustrate the congressional desire of achieving uniform, international standards." *Id.* at 110 (parenthetically quoting *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 168 (1978)). Conversely, in Title I Congress intended to leave room for "state authority to regulate the peculiarities of local waters if there was no conflict with federal regulatory determinations," and so did not preempt the field. *Id.*

Here, the government does nothing to distinguish separate parts of the LIA that give rise to its proposed separate regimes of field and conflict preemption. Moreover, both the government's field and conflict preemption arguments rest on the same interest in uniformity (which, of course, is the same interest that caused the court to find Title II field preemptive in *Locke*). And finally, as Respondents point out, see Resp. Br. at 55, the government itself prescribes warnings as part of its overall regulatory effort under the LIA. As a result, there is no coherent basis for treating failure-to-warn claims as somehow falling outside the regulated and preempted field.

The government protests that finding field preemption might leave some plaintiffs without remedies. U.S. Br. at 19–20. But preemption—whether conflict or field, express or implied—*always* has the effect of leaving plaintiffs without a state law remedy. Moreover, the whole point of field preemption is that it preempts an entire field beyond the specific issues addressed by particular federal regulations, which may or may not provide a federal remedy. *Napier* itself emphasized that federal regulation of a specific topic within the LIA's scope was not necessary for field preemption to apply to state rules on that topic. 272 U.S. at 612–13. The government cannot be arguing that the preemptive scope of federal law for field or conflict preemption should be judged by reference to federal laws providing a remedy, as opposed to the federal laws pervasively regulating a field. That would be getting matters backwards. Remedial provisions are generally only a small part of a federal regulatory regime. It is commonplace for a finding of even conflict preemption to render the plaintiff without a remedy, and the nature of field preemption makes that result even more likely. As the government itself recognizes, the scope of the field preempted is co-extensive with the regulable field, but not with the scope of the federal remedial scheme. Indeed, preemption is often necessary precisely because allowing a state remedy—with the attendant costs to the regulated party in terms of litigation expenses and state-law judgments—in circumstances where federal law does not provide a remedy is inconsistent with the federal scheme.

D. The Government's Approach Ignores The Practical Realities of Locomotive Manufacture and Operation.

The government's proposed approach not only creates doctrinal confusion, but it simply fails to reflect the practical realities of locomotive manufacture and operation. The field preempted by the LIA has always been understood to cover locomotives "used in interstate commerce" and not only locomotives while in use, because any effort to limit regulation to the latter would be a practical impossibility. Locomotives are designed to be instrumentalities of interstate commerce that transcend state borders. They are designed to have long useful lives that necessitate the need for continual inspection and occasional repair. To carve out the repair yard or some broader swath of regulation that does not implicate locomotives while in use simply does not work. The Court recognized as much in *Napier*.

For the most part, the government too seems to recognize the need for uniform rules for the design and manufacture of instrumentalities of interstate commerce like locomotives. The government acknowledges that such design questions for locomotives in use are within the field preempted by *Napier*. The government also appears to recognize the threat to uniformity from state laws that would require locomotives to be equipped differently in different jurisdictions, even for purposes of facilitating repairs. If different states had conflicting requirements, then the threat to interstate commerce would be palpable. Certain locomotives would be limited to service in certain

states. And even in the absence of a direct conflict, the rule of the most demanding state would be substituted for an optimal federal rule.

The government seems to think that failure-to-warn claims are somehow different. They are not. The manufacturer of a locomotive and its parts and appurtenances cannot possibly control the multitude of possible circumstances in which a locomotive, once manufactured, will be inspected or repaired. As even the government recognizes, the most the manufacturer could do is attach a warning label to the locomotive, or to the relevant part or appurtenance. But which label? The government admits that, because different states likely would require different (and possibly conflicting) warnings about differing topics, under its approach locomotive and locomotive-parts manufacturers would be forced to "either affix the most stringent form of warning required by any particular State or affix a label that incorporates requirements imposed by several States." U.S. Br. at 27. Even then, of course, the evolving nature of state tort requirements would often make it difficult for a manufacturer to determine whether it had actually identified the most restrictive requirement, or whether its label had captured every variation of warning required by the various states. It appears the government imagines a map of the fifty states prominently displayed on the side of each locomotive with the appropriate warning affixed on each state on the map (and perhaps much smaller maps on the individual component parts also covered by the LIA). Presumably, there could be recalls from time to time to update the maps to keep pace with evolving tort

law. That would be an odd way to regulate an instrumentality of interstate commerce, and needless to say there is no hint in the LIA or *Napier* that Congress intended such an absurd result.

But the alternatives to adding fifty-state labels to locomotives are not obvious. The government seems insensitive to the fact that the nature of the railroad business means that manufacturers cannot predict where, under what circumstances, or even by whom their locomotives will be repaired. Locomotives can of course be used—and repaired—in any state, and at various locations. The government's only response to this is to suggest that "[m]anufacturers and railroads may post warnings in repair shops themselves . . . or on the packaging for the materials in question," U.S. Br. at 27, but even this would leave manufacturers unprotected against many claims. As an initial matter, the government ignores the fact that repair shops generally are owned by the railroads, not by the manufacturers. Whatever the government's ability to force such postings in the workplace, locomotive manufacturers lack the power to ensure that repair yards carry the appropriate warnings. It would not even work to have a manufacturer insist on the posting of warnings as a condition of sale because locomotives are repaired when and where the locomotive needs the repair, which will not necessarily be in a railyard owned by the railroad that purchased the locomotive. Indeed, as Respondents point out, see Resp. Br. at 57, locomotives often need to be repaired in remote repair shops that are outside the control of both the manufacturer and the railroad that purchased and operates the locomotives. And, especially in light of

the long useful lives of locomotives, a manufacturer cannot know whether a railroad purchasing its products might re-sell them to another railroad, with whom the manufacturer might not have any such contractual arrangement.

This very case demonstrates that the government's other suggestion—placing warnings on packaging—also often would be insufficient. Mr. Corson allegedly was injured by inhaling asbestos dust from parts he was *removing* from locomotives, meaning that any packaging on which a warning could have been printed would no longer have been in existence. Although a manufacturer could attempt to address such situations by printing warnings on the packaging of replacement parts, it would have no way of knowing whether its own replacement parts would be used in any given instance, or indeed whether the workers removing the worn parts necessarily would unpack the replacements from their shipping crates or otherwise handle them (and thus be exposed to the warnings) before removing the worn parts. Practically speaking, then, in order to avoid potential liability for state-law failure-to-warn claims pertaining to the alleged dangerousness of its locomotives in the repair process, the manufacturer would have no choice but to print the required warnings on the locomotive itself. As these warnings would necessarily remain on the locomotive while it was in use, the result would be that in-use locomotives—the core concern of the LIA—would wind up festooned with warning labels required by state law. Worse still, since exhaustive multi-state warnings are wholly impractical, the only realistic option for avoiding liability would be

for manufacturers of locomotives and locomotive parts to alter designs according to the requirements of state law so as to obviate the need for a warning.

In short, the government's elaborate efforts to reconceive preemption doctrine to allow failure-to-warn claims to escape the reach of *Napier* does not work as a legal or practical matter. It takes the Court's already elaborate preemption jurisprudence and adds a new hybrid. And the government struggles mightily to preserve failure-to-warn claims that raise the same threat to uniformity that the government generally credits. The simple and correct course is to preserve *Napier* and reject the government's novel proposal. The reliance interests in a faithful application of *Napier* provide just one more reason to stay the course.

E. Locomotive Manufacturers Have Significant Reliance Interests in the Faithful Application of *Napier*.

From the perspective of a locomotive manufacturer considering how to design or build the locomotive, there is no difference between a locomotive "in use" or "at rest." The locomotive will inevitably be used in interstate commerce and occasionally sit in the repair yard awaiting inspection or repair. A locomotive, after all, is a single object, and cannot be designed or constructed in one manner or with one set of materials for purposes of in-use safety, and in another manner or with different materials only for purposes of repair (or aesthetics, or speed, or fuel efficiency). For almost ninety years, manufacturers have been producing locomotives and locomotive equipment knowing that federal regulation governs the object—the instrumentality of interstate

commerce—and that state laws that purport to regulate the design, manufacture or choice of materials are preempted no matter what the state's purported interest in regulating.

As noted earlier, the government has not been so bold as to ask for *Napier* to be expressly overturned, and for good reason. *Napier* is an 85-year-old precedent that has been respected and applied in the lower courts, has gained the imprimatur of Congress in its later rail legislation and has engendered substantial reliance interests. But all the same factors that would preclude *Napier*'s overruling counsel just as forcefully against its evisceration by substantially restricting the scope of the preempted field.

For many decades, relying on *Napier*, locomotive manufacturers have operated on the premise that if they complied with the LIA, their designs and manufacturing processes would not be questioned under state law. As a result, locomotive manufacturing, design and materials standards are geared toward LIA compliance. If *Napier* now were to be overturned, the result would be a flood of lawsuits by plaintiffs allegedly injured over many decades. Some would claim that the manufacturers failed to comply with design standards that the manufacturers, relying on *Napier*, did not plan for at the time they built their locomotives. Other plaintiffs would allege that the manufacturers failed to include warnings that, again based on *Napier*, they very reasonably believed were not required.

Both the nature of the industry and the relative paucity of solvent manufacturers make the threat of unfair retroactive liability particularly acute

precisely for the failure-to-warn claims the government works so hard to save from preemption. As noted, a given locomotive may be repaired in a yard owned by a different company far from the locomotive's home base. By the same token, a repair yard worker will see any number of different locomotives from different manufacturers and operated by different railroads. It would be no easy task for a repair yard worker with an exposure claim to pinpoint the precise repairs and the precise "failures to warn" that produced an injury. Moreover, in an industry with few remaining solvent manufacturers, the potential for workers mistakenly to associate their injury with the few remaining solvent entities is very real. Needless to say, there is nothing any manufacturer can do at this point to warn about these injuries. Thus, to impose failure-to-warn liability at this late stage on manufacturers who operated with a settled understanding of *Napier*'s scope would implicate reliance interests of the highest order.

In situations like this, where a decision by this Court "has engendered substantial reliance and has become part of the basic framework of a sizable industry," the principle of *stare decisis* takes on its greatest strength. *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 317 (1992); *see also Allied-Signal, Inc. v Dir., Div. of Taxation*, 504 U.S. 768, 785 (1992) (declining to "defeat the reliance interest of those corporations that have structured their activities and paid their taxes based upon the well-established rules we here confirm."). It would be fundamentally unfair to pull the rug out from under the industry that has relied on *Napier* for so

long. The Court should decline the invitation to replace nearly a century of clarity with a hybrid preemption regime that seems gerrymandered to preserve failure-to-warn claims that impose the same basic difficulties as claims all agree should be preempted. Especially in light of the substantial reliance interests in *Napier*, this Court should faithfully apply that decision and affirm the decision below.

CONCLUSION

For all the reasons stated herein, the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

Paul D. Clement
Counsel of Record
Nicholas J. Nelson
BANCROFT PLLC
1919 M Street, N.W.,
Suite 470
Washington, D.C. 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for amicus curiae
General Electric Corp.

October 11, 2011

AMICUS CURIAE BRIEF

No. 10-879

In The Supreme Court of the United States

GLORIA GAIL KURNS, Executrix of the Estate of George M. Corson, Deceased, and FREIDA E. JUNG CORSON, Widow of her own right,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION and VIAD CORP.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* GRIFFIN WHEEL COMPANY IN SUPPORT OF RESPONDENTS

LARRY D. OTTAWAY
Counsel of Record
MONTY B. BOTTOM
ANDREW M. BOWMAN
FOLIART, HUFF, OTTAWAY & BOTTOM
201 Robert S. Kerr Avenue,
Suite 1200
Oklahoma City, Oklahoma 73102
Telephone: (405) 232-4633
Facsimile: (405) 232-3462
foliartfirm@oklahomacounsel.com

Attorneys for Amicus Curiae Griffin Wheel Company

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. FIELD PREEMPTION UNDER BOTH THE LIA AND THE SAA IS INTEGRAL TO THE FEDERAL GOVERNMENT'S UNIFORM REGULATION OF THE RAILROAD INDUSTRY AND THIS COURT'S DECISION WILL AFFECT THE PREEMPTIVE SCOPE OF BOTH ACTS 5

A. Brief History of LIA and SAA Field Preemption 6

B. The LIA and SAA are Inextricably Linked and Deciding the Field Preemptive Scope of One without Considering the Other is Impractical, if not Impossible 16

II. THE ARGUMENTS ADVANCED BY PETITIONERS ARE UNWORKABLE AND, IF ACCEPTED, WOULD BE EQUIVALENT TO A RETROACTIVE PENALTY AGAINST RAILROADS AND EQUIPMENT MANUFACTURERS 19

A. The "In Use" Argument Lacks Merit 19

B. LIA Field Preemption Applies to Claims Against Manufacturers 26

TABLE OF CONTENTS – Continued

Page

C. The Retroactive Effect of Overturning *Napier* would be Contrary to the Doctrine of *Stare Decisis* 29

CONCLUSION 34

APPENDIX

Robert N. Thompson, *Air Quality in Baltimore and Ohio Trains Descending the Altamont-Piedmont Grade in West Virginia* (December 1972) ..... App. 1

J.F. Quealy & J.M. Wandrisco, *Report on Research Work FRA Purchase Order 810-4361, Asbestos Emissions from Railroad Brake Shoes* (July 1978) ..... App. 10

U.S. Government Memorandum Regarding Brake Shoe Emission Test Reports (April 19, 1978) ..... App. 25

TABLE OF AUTHORITIES

Page

CASES

Angell v. Chesapeake & Ohio Ry., 618 F.2d 260 (4th Cir. 1980) 24

Baltimore & Ohio R.R. Co. v. Hooven, 297 F. 919 (6th Cir. 1924) 24

Bell v. Illinois Central R.R. Co., 236 F. Supp. 2d 882 (N.D. Ill. 2001) 28

Bibb v. Navajo Freight Lines, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959) 15

Brady v. Terminal R.R., 303 U.S. 10 (1938) 24

Bruesewitz v. Wyeth LLC, ___ U.S. ___, 131 S.Ct. 1068, 179 L.Ed.2d 1 (2011) 31

CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008) 29

Carrillo v. ACF Industries, Inc., 980 P.2d 386 (Cal. 1999), *cert. denied*, 528 U.S. 1077 (2000) 10, 15, 16, 18

Crockett v. Long Island R.R., 65 F.3d 274 (2d Cir. 1995) 24

D'Amico v. Garlock Sealing Technologies, LLC, 2007 WL 2702774 (E.D. Pa.) 28

Darby v. A-Best Prods. Co., 2002 WL 31839197 (Ohio App. Jan. 15, 2003), *aff'd*, 811 N.E.2d 1117 (Ohio 2004), *cert. denied*, 543 U.S. 1146 (2005) 21, 27

Davis v. Manry, 266 U.S. 401 (1925) 12

TABLE OF AUTHORITIES – Continued

Page

Deans v. CSX Transp., Inc., 152 F.3d 326 (4th Cir. 1998) 24

Estes v. Southern Pac. Transp. Co., 598 F.2d 1195 (10th Cir. 1979) 24

Forrester v. American Dieselectric, Inc., 255 F.3d 1205 (9th Cir. 1999) 27

Frastaci v. Vapor Corp., 158 Cal. App. 4th 1389 (2007) 21, 29

General Motors v. Kilgore, 853 So.2d 171 (Ala. 2002) 28

Gilvary v. Cuyahoga Valley Ry. Co., 292 U.S. 57 (1934) 12, 18

In Re: West Virginia Asbestos Litigation, 592 S.E.2d 818 (W. Va. 2003), *cert. denied sub nom., Abbott v. A-Best Products Company*, 549 U.S. 823 (2006) 28, 29

John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008) 29

Law v. General Motors Corp., 114 F.3d 908 (9th Cir. 1997) 15, 22, 27

Lilly v. Grand Trunk R.R., 317 U.S. 481 (1943) 23

Lorincie v. Southeastern Pennsylvania Trans. Auth., 34 F. Supp. 2d 929 (E.D. Pa. 1998) 28

Lyle v. Atchison, T. & S.F. Ry. Co., 177 F.2d 221 (7th Cir. 1949) 25

Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983) 25

TABLE OF AUTHORITIES – Continued

Page

McGrath v. Consolidated Rail Corp., 136 F.3d 838 (1st Cir. 1998) 24

Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605 (1926) ..... *passim*

New York, C. & St. L.R.R. Co. v. Kelly, 70 F.2d 548 (7th Cir. 1934) 24

Oglesby v. Delaware & Hudson Railway Co., 180 F.3d 458 (2d Cir. 1998), *cert. denied*, 120 S.Ct. 498 (1999) 22, 27

Oglesby v. Delaware & Hudson Railway Co., 964 F. Supp. 57 (N.D. N.Y. 1997) 28

Pennsylvania v. Nelson, 350 U.S. 497 (1956) 21

Pennsylvania Ry. Co. v. Pub. Service Comm'n, 250 U.S. 566 (1919) 12, 17, 18

Phillips v. CSX Transp., Inc., 190 F.3d 285 (4th Cir. 1999) 25

Pinkham v. Maine Cent. R.R. Co., 874 F.2d 875 (1st Cir. 1989) 25

R.J. Corman R. Co. v. Palmore, 999 F.2d 149 (6th Cir. 1993) 10, 15

Ransford v. Griffin Wheel Co., Inc., 2009 WL 1994740 (Cal. App.), *cert. denied*, 130 S.Ct. 1691, 176 L.Ed.2d 181 (March 1, 2010) 21

Scheiding v. General Motors Corp., 993 P.2d 996 (Cal. 2000), *cert. denied*, 531 U.S. 958 (2000) 27, 28

TABLE OF AUTHORITIES – Continued

Page

Seaman v. A.P. Green Industries, Inc., 707 N.Y.S.2d 299 (N.Y. Sup. Ct. 2000) 16, 21, 28

Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945).....15

Southern Pac. Transp. Co. v. Oregon PUC, 9 F.3d 807 (9th Cir. 1993) 14

Southern Ry. Co. v. R.R. Comm., Indiana, 236 U.S. 439 (1915).....*passim*

Springston v. Consolidated Rail Corp., 130 F.3d 241 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998).....11, 27

Steer v. Burlington N., Inc., 720 F.2d 975 (8th Cir. 1973).....25

Taylor AG Indus. v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995).....27

Tisneros v. Chicago & N.W. Ry., 197 F.2d 466 (7th Cir.), *cert. denied*, 344 U.S. 885 (1952).....24

Trinidad v. Southern Pac. Transp. Co., 949 F.2d 187 (5th Cir. 1991) 24

United Transp. Union v. Long Island R. Co., 455 U.S. 678 (1982).....10

Urie v. Thompson, 337 U.S. 163 (1949) 6

Viad Corp. v. Superior Court, 55 Cal. App. 4th 330, 64 Cal.Rptr.2d 136 (1997).....28

TABLE OF AUTHORITIES – Continued

Page

Wright v. Arkansas & Mo. R.R., 574 F.3d 612 (8th Cir. 2009) 24

Wright v. General Electric Co., 242 S.W.3d 674 (Ky. Ct. App. 2007) 28

STATUTES

45 U.S.C. § 51, *et seq.* 24

49 U.S.C., explanation, p. V 10

49 U.S.C. § 20103 12

49 U.S.C. § 20106 13

49 U.S.C., Subtitle V, Part A, Ch. 203, §§ 20301, *et seq.* ..... *passim*

49 U.S.C. §§ 20301-20306 6

49 U.S.C. §§ 20302 ..... 9, 22

49 U.S.C., Subtitle V, Part A, Ch. 207, §§ 20701, *et seq.* ..... *passim*

49 U.S.C. §§ 20701-20903 6

49 U.S.C. § 20702 23

FEDERAL REGULATIONS

49 C.F.R., Ch. II 13

49 C.F.R., Ch. II, Part §§ 232, 232.1, 232.10(h)(1), 232.10(i)(l), 232.12(f)(2), 232.13, 232.13(a), 232.13(b), 232.14 13

TABLE OF AUTHORITIES – Continued

Page

49 C.F.R., Ch. II, Part § 232, App. B 13

49 C.F.R. §§ 229.21, 229.23-229.25, 229.27-229.31 23

COURT RULES

U.S. Supreme Court Rule 37.6 1

OTHER AUTHORITIES

American Law of Products Liability 3d, § 32:2, p. 14 32

Dan B. Dobbs, *The Law of Torts*, § 363, pp. 1004, 1005 (2000) 31, 32

Griffin Wheel Company v. Harris, Case No. 10-520 .....1, 34

J.F. Quealy & J.M. Wandrisco, *Report on Research Work FRA Purchase Order 810-4361, Asbestos Emissions from Railroad Brake Shoes* (July 1978) 30

John Crane, Inc. v. Thomas Atwell, United States Supreme Court Case No. 10-272 1

Restatement (Third) of Torts: Products Liability § 2 (1997) 31, 32

TABLE OF AUTHORITIES – Continued

Page

Robert N. Thompson, *Air Quality in Baltimore and Ohio Trains Descending the Altamont-Piedmont Grade in West Virginia* (December 1972) 30

U.S. Dep't of Transp., Report to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996), at 10-12 30

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Griffin Wheel Company ("GWC") respectfully submits this brief as *amicus curiae*. The parties have filed with the Court letters of blanket consent to the filing of *amicus curiae* briefs.[1]

Prior to 1994, GWC sold and manufactured railroad brake shoes which were used on both locomotives and railcars. GWC is also the petitioner in another case pending before this Court on a petition for a writ of certiorari. *See Griffin Wheel Company v. Harris*, Case No. 10-520.[2] The *Harris* case involves virtually the same factual circumstances giving rise to this case, that is, a railroad employee who was allegedly exposed to asbestos from train equipment. Unlike this case, however, both locomotive and railcar parts (brake shoes) are at issue in *Harris*. Thus, GWC in that case relies upon the field preemptive effect of

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* Griffin Wheel Company discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Griffin Wheel Company, its members, its counsel, or its insurers (Travelers Insurance Company and Fireman's Fund Insurance Company) make monetary contribution to the preparation or submission of this brief.

[2] There is also a third case pending before this Court which raises the same issue as this case. *See John Crane Inc. v. Atwell*, Case No. 10-272. Both *Harris* and *Atwell* have been conferenced twice, but no ruling has been issued on the petitions for writs of certiorari. The cases are currently being held by the Court presumably to be addressed in light of the decision in this case.

both the Locomotive Boiler Inspection Act, 49 U.S.C., Subtitle V, Part A, Ch. 207, §§ 20701, *et seq.* ("LIA") ***and*** the Safety Appliance Act, 49 U.S.C., Subtitle V, Part A, Ch. 203, §§ 20301, *et seq.* ("SAA"). Here, because only locomotive equipment is involved, SAA field preemption is not raised. As explained below, the LIA and SAA are equally important in protecting the federal government's nationally uniform regulation of the railroad industry, and the field preemption analysis under both acts is identical. Therefore, GWC submits this brief in order to focus attention on the fact that in the field preemption context, the LIA and the SAA are inextricably linked, and the Court's decision in this case will effectively apply to a broader range of claims than only those involving locomotives and locomotive equipment. GWC will also address the fallacy of Petitioners' arguments with respect to the LIA field preemption issue raised here.

SUMMARY OF ARGUMENT

This Court long ago established the broad field preemptive effect of both the LIA and SAA, and each is a necessary part of the uniform regulatory scheme that Congress intended in order to allow the nation's railroads to operate efficiently and effectively across state lines. Only locomotives and locomotive equipment are at issue here. Thus, only LIA field preemption is raised. However, the Court should consider that its decision in this case will necessarily affect

lower courts' treatment of SAA field preemption going forward. The two statutes are inextricably linked and their respective fields of preemption must work in tandem to effectively ensure that national uniformity is maintained in the regulation of the railroad industry.

Petitioners assert several erroneous arguments as to why LIA field preemption should not apply to their claims in this case. First, Petitioners argue that the LIA only regulates locomotives that are "in use on a railroad line," and thus, the field preemptive scope of the LIA does not extend to locomotives and locomotive parts while they are being repaired or installed off-line. (Pet. Br. 19-28). In other words, Petitioners suggest that states should be allowed to regulate a locomotive's design, construction, parts, and materials when a locomotive is being repaired, while the FRA exclusively regulates that same locomotive's design, construction, parts, and materials when it is "in use." That analysis is erroneous and the cases addressing the issue have rejected the argument. As this Court has held, the federally preempted field is defined not by ***where*** the regulation is applied but by the physical "object" that is regulated. *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 611-13 (1926). The physical object of the state regulation is the locomotive and the design, construction, and material of its parts. Therefore, any state regulation directed at that ***object***, whether or not it happens to be "in use" at the time, is preempted.

Next, Petitioners also argue that the LIA does not preempt claims against railroad equipment manufacturers arising prior to 1988. (Pet. Br. 28-31). This position, however, is inconsistent with the goal of LIA field preemption and has been widely rejected by both state and federal courts. Both Respondents and the government address the fact that Congress's goal of national uniformity under the LIA would clearly be undermined if states were allowed to simply move one step up the supply chain and regulate the manufacturers and distributors of locomotives and locomotive parts that supply products to railroads. (Res. Br. 42-44; U.S. Br. 27-29). Like the "in use" argument discussed above, Petitioners' assertion on this point fails because it is just as irrelevant to consider ***against whom*** the state regulation is enforced as ***where*** the regulation is implemented. Again, the relevant inquiry for purposes of LIA field preemption is whether the state and federal regulations are "directed to the same subject – ***the equipment of locomotives***" and whether "[t]hey operate upon the same ***object***." *Napier*, 272 U.S. at 612 (emphasis added).

Finally, this Court should leave the holding of *Napier* in place. Overruling it at this point in time would, in essence, punish railroads and manufacturers retroactively and afford them no chance to comply with a new and different pronouncement of law. Such a result would be contrary to the doctrine of *stare decisis*. Although Petitioners urged this Court to overrule *Napier* in their petition for certiorari (Pet. 36-40), they tellingly do not renew that argument in

their merits brief. (U.S. Br. 12 n.3). In addition, allowing state court juries, based on varying state-by-state standards, tc impose liability on railroads and manufacturers for warnings-based claims would result in the same unfair retroactive restriction on commerce. Moreover, the government's proposed distinction between "warnings" claims and "product defect" claims (U.S. Br. 25-27), is unworkable. Failure to warn claims require courts to examine, as a threshold matter, whether the product could have been designed or constructed without the risk that is the subject of the warning. Even allowing states to regulate only warnings would still disrupt Congress's goal of national uniformity in regulation of the railroad industry. Thus, the Court should affirm the judgment of the court of appeals and leave the holding of *Napier* in place.

ARGUMENT

I. FIELD PREEMPTION UNDER BOTH THE LIA AND THE SAA IS INTEGRAL TO THE FEDERAL GOVERNMENT'S UNIFORM REGULATION OF THE RAILROAD INDUSTRY AND THIS COURT'S DECISION WILL AFFECT THE PREEMPTIVE SCOPE OF BOTH ACTS

The interstate railroad system cannot function properly without uniform, consistent laws and regulations on a national level. The field preemptive effect of both the LIA and the SAA is part and parcel of the

broad regulatory scheme that allows efficient interstate railroad operation. Thus, it is important to consider that this Court's decision will affect the continuing vitality of both LIA *and* SAA field preemption.

A. Brief History of LIA and SAA Field Preemption

In 1893, Congress enacted the first of the Safety Appliance Acts, and in 1911 it followed with the LIA. These two statutes were enacted with the same Congressional purposes, and are now both codified in Title 49 of the United States Code (49 U.S.C. §§ 20301-20306 (1994) (SAA); and 49 U.S.C. §§ 20701-20903 (1994) (LIA)). Both are remedial statutes which must be construed liberally to achieve their purpose. *Urie v. Thompson*, 337 U.S. 163, 182, n.20 (1949).

The LIA is concerned exclusively with locomotives, including their "tender, parts, and appurtenances," and states in pertinent part as follows:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances –
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
>
> (2) have been inspected as required under this chapter and regulations prescribed by

> the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

49 U.S.C. § 20701. The SAA applies to both locomotives and rail cars and sets forth the various safety appliances required to be present on each. The pertinent section of the SAA provides as follows:

> (a) **General.** – Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines –
>
> (1) a vehicle only if it is equipped with –
>
> (A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;
>
> (B) secure sill steps and efficient hand ***brakes***; and
>
> (C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;
>
> (2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving ***wheel brake*** and appliances for operating ***the train-brake system***; and

(5) a train only if –

(A) enough of the vehicles in the train are equipped with ***power or train brakes*** so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common ***hand brakes*** for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with ***power or train brakes*** and the engineer is using the power or ***train brakes*** on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

(b) **Refusal to Receive Vehicles Not Properly Equipped.** – A railroad carrier complying with subsection (a)(5)(A) of this section may refuse to receive from a railroad line of a connection railroad carrier or a shipper a vehicle that is not equipped with ***power or train brakes*** that will work and readily interchange with the ***power or train brakes*** in use on the vehicles of the complying railroad carrier.

(c) **Combined Vehicles Loading and Hauling Long Commodities.** – Notwithstanding

subsection (a)(1)(B) of this section, when vehicles are combined to load and haul long commodities, only one of the vehicles must have ***hand brakes*** during the loading and hauling.

(d) **Authority to Change Requirements.** – The Secretary may –

(1) change the number, dimensions, locations, and manner of application prescribed by the Secretary for safety application prescribed by the Secretary for safety applications required by subsection (a)(1)(B) and (C) and (2) of this section only for good cause and after providing an opportunity for a full hearing;

(2) amend regulations for installing, inspecting, maintaining, and repairing ***power and train brakes*** only for the purpose of achieving safety; and

(3) increase, after an opportunity for a full hearing, the minimum percentage of vehicles in a train that are required by subsection (a)(5)(B) of this section to be equipped and used with ***power or train brakes***.

(e) **Services of Association of American Railroads.** – In carrying out subsection (d)(2) and (3) of this section, the Secretary may use the services of the Association of American Railroads.

49 U.S.C. § 20302 (emphasis added).

Title 49, including both the LIA and SAA, contains federal statutes "of a general and permanent nature relating to Transportation. . . ." 49 U.S.C., explanation at p. V.

> The nation's economy and society in general are heavily dependent upon transportation. The need for federal government regulation of such a vital and far reaching industry was recognized by the framers of the United States Constitution in granting Congress the power to regulate commerce. Since that time [Congress] has attempted to provide the citizens of this country with safe, economical, and nondiscriminatory means of transportation.

Id.

Consistent with Congress's power over interstate commerce and transportation, railroads have been "subject to comprehensive federal regulation for nearly a century." *Carrillo v. ACF Industries, Inc.*, 980 P.2d 386, 389 (Cal. 1999) (quoting *United Transp. Union v. Long Island R. Co.*, 455 U.S. 678, 687 (1982)), *cert. denied*, 528 U.S. 1077 (2000). Congress "inten[ds] that railroads should be regulated primarily on a national level through an integrated network of federal law," and has regulated "almost all aspects of the railroad industry, including rates, safety, labor relations, and worker conditions." *R.J. Corman R. Co. v. Palmore*, 999 F.2d 149, 152 (6th Cir. 1993).

In recognition of this comprehensive regulatory scheme and Congressional intent, both the LIA and

SAA have been given a broad field preemptive effect by this Court. The field preemptive scope of the LIA was first established in 1926 when this Court unanimously held that it "extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926). *Napier* further expressly held as follows:

> " . . . **[T]he Boiler Inspection Act, as we construe it, was intended to occupy the field.** The broad scope of the authority conferred upon the Commission[3] leads to that conclusion. Because the standard set by the Commission must prevail, **requirements by the States are precluded, however commendable or however different their purpose.**"

Napier, 272 U.S. at 613 (emphasis added). Likewise, this Court first established the field preemptive effect of the SAA nearly a century ago in *Southern Ry. Co. v. R.R. Comm., Indiana*, 236 U.S. 439 (1915), which holds as follows:

> "[T]he exclusive effect of the ***Safety Appliance Act*** did not relate merely to details of

---

[3] "Commission" refers to the Interstate Commerce Commission which at the time *Napier* was decided had the controlling authority over the railroads. That authority was transferred to the Department of Transportation in 1966 by the Department of Transportation Act. *See Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 244 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998).

> the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employees. The States thereafter could not legislate so as to require greater or less or different equipment.
>
> * * *
>
> [I]t is sufficient here to say the Congress has so far ***occupied the field*** of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject."

Southern Ry. Co., 236 U.S. at 446-47 (emphasis added); *see also Pennsylvania Ry. Co. v. Pub. Service Comm'n*, 250 U.S. 566, 569 (1919) (via the SAA, the United States has exercised its exclusive power in the field, and thus "the states no more can supplement its requirements than they can annul them"); *Davis v. Manry*, 266 U.S. 401 (1925) (reaffirming SAA field preemption); *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57, 60-61 (1934) ("So far as the safety equipment of such vehicles is concerned, [the Safety Appliance Act] operates to exclude state regulation whether consistent, complementary, additional or otherwise.").

Over the past century, the federal government has specifically regulated the design, maintenance, and safety of locomotives (by way of the LIA) and rail cars (by way of the SAA). Pursuant to authority granted in those statutes and generally in 49 U.S.C. § 20103, the Secretary of Transportation has adopted

a comprehensive array of detailed federal regulations governing the operation and safety of the railroads and the necessary equipment, including locomotives, railcars, and their brakes. Those regulations are set forth in Chapter II of Title 49 of the Code of Federal Regulations. Chapter II is divided into thirty-eight (38) parts, addressing in excruciating detail matters from "Informal Rules of Practice" to "Magnetic Levitation Technology" and all manner of topics in between.

For example, in the context of brakes, Title 49 C.F.R., Part 232, specifically governs "Railroad Power Brakes and Drawbars." These regulations are exhaustive, precise, and detailed. They set forth, for instance, the percentage of railcars that must have brakes (§ 232.1), the minimum brake shoe clearance (§ 232.10(h)(1)), the proper brake shoe alignment (§ 232.10(i)(1)), minimum brake cylinder piston travel (§ 232.12(f)(2)), brake tests (§ 232.13), and brake equipment testing (§ 232.14). The regulations address brake shoes, power brakes, brake valves, equalizing reservoirs, brake piping, operating valves, and brake pressures (App. B to Part 232).

Further, the continuing vitality of field preemption under both the LIA and the SAA is clearly recognized by these regulations. Title 49 C.F.R. § 232.13(b) makes clear that ***in addition to and as a matter separate from*** express preemption under the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20106 (1994):

> Preemption should **also** be considered pursuant to the **Locomotive Boiler Inspection Act** (now codified at 49 U.S.C. 20701-20703), the **Safety Appliance Acts** (now codified at 49 U.S.C. 20301-20304), and the Commerce Clause **based on the relevant case law pertaining to preemption under those provisions**.

(Emphasis added). This regulation thus expressly clarifies that broad field preemption under the LIA and SAA, and as originally set forth by this Court in *Napier* and *Southern Ry. Co.*, is still in existence and necessary to the uniform of regulation of the railroad industry.

Field preemption under the LIA and SAA is more than a mere legal side effect of Congress's exhaustive regulatory scheme; it is an integral component of such regulation. The Ninth Circuit Court of Appeals discussed LIA preemption's role in this respect as follows:

> This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances, with most railroad routes wending through interstate commerce. The virtue of uniform national regulation "is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state." *Southern Pac. Transp. Co. v. Oregon PUC*, 9 F.3d 807,

> 811 (9th Cir.1993); *see also R.J. Corman R.R. v. Palmore*, 999 F.2d 149, 152 (6th Cir.1993) ("Th[e] lasting history of pervasive and uniquely-tailored congressional action indicates Congress's general intent that railroads should be regulated primarily on a national level through an integrated network of federal law."). Any state law that undermines this regime is preempted by the LIA.

Law v. General Motors Corp., 114 F.3d 908, 910 (9th Cir. 1997). Likewise, the California Supreme Court has recognized the importance of uniform regulation in the context of the SAA: "Given the goal of national uniformity, allowing (state remedies for design defect) claims would substantially impair its function." *Carrillo*, 980 P.2d at 393. The *Carrillo* court went on to expound on this issue:

> This observation suggests an additional concern considering the national dimension of rail transportation. Should safety requirements imposed by individual states conflict, they could create an unconstitutional burden on interstate commerce. (See, e.g., *Bibb v. Navajo Freight Lines* (1959) 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003; *Southern Pacific Co. v. Arizona* ex rel. *Sullivan* (1945) 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915.) "A State which insists on a design out of line with the requirements of almost all the other States may sometimes place a great burden of delay and inconvenience on those interstate [transporters] entering or crossing its territory." (*Bibb v. Navajo Freight Lines,*

> *supra,* 359 U.S. at pp. 529-530, 79 S.Ct. 962.) Absent uniform federal standards for safety appliances, such potential is inherent in the "free runner" system by which freight cars are readily interchanged throughout the country.

Id.

Field preemption under the LIA and SAA has far reaching implications related to the railroad industry and thus, interstate commerce. Both of these statutes are vital parts of the comprehensive scheme of federal regulation over railroad safety and equipment and preempt all state law in their respective fields, just as they have since this Court definitively determined their preemptive scope in *Napier* and *Southern Ry. Co.* Thus, when deciding the issue of the continued vitality of LIA field preemption, it is important also to consider the effect such a decision will have on field preemption under the SAA.

B. The LIA and SAA are Inextricably Linked and Deciding the Field Preemptive Scope of One without Considering the Other is Impractical, if not Impossible

The SAA is considered a "sister statute" of the LIA, *Seaman v. A.P. Green Industries*, 707 N.Y.S.2d 299, 302 (N.Y. Sup. Ct. 2000), and is afforded the same type of broad field preemptive effect in the field of train safety appliances (such as railcar brake shoes) as the LIA is given in the field of locomotive design and equipment. The reasoning behind LIA

field preemption as stated in the court of appeals' opinion (*i.e.*, "Congress's goal of uniform railroad equipment regulation," *see* Pet. App. 14a,) is just as applicable to safety equipment on railcars under the SAA. Any other result would effectively eviscerate Congress's goal of national uniformity by undermining its very purpose. For example, it would make no practical sense that the design and make-up of brake shoes on locomotives would be reserved exclusively for federal regulation, but that individual states would be free to regulate those exact same parts if they happened to be attached to the railcars being propelled by the locomotives.

As discussed above, this Court has recognized the field preemptive effect of the SAA since 1915, when it decided *Southern Ry. Co.* This Court again recognized the SAA's field preemptive effect in *Pennsylvania Ry. Co. v. Pub. Service Comm'n*, 250 U.S. 566 (1919), where it stated:

> But when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the States no more can supplement its requirements than they can annul them.
>
> * * *
>
> The subject matter in this instance is peculiarly one that calls for uniform law and in our opinion regulation by the paramount authority has gone so far that the statute of Pennsylvania cannot impose the additional obligation in issue here.

Id. at 569. Again in 1934, this Court reiterated that "[s]o far as the safety equipment of such (railroad) vehicles is concerned, these acts (the SAA) operate to exclude state regulation whether consistent, complimentary, additional, or otherwise." *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57 (1934).

The Supreme Court of California recognized this Court's establishment of SAA field preemption. *Carrillo v. ACF Industries, Inc.*, 980 P.2d 386, (Cal. 1999), *cert. denied*, 528 U.S. 1077 (2000). Holding that the plaintiff's state law products liability and failure to warn claims were preempted by the SAA, *Carrillo* states as follows:

> ***As interpreted by the United States Supreme Court***, the statutes [the SAA] and their implementing regulations reflect a congressional intent to occupy the field regulating railroad safety appliances, thus precluding any state law directed to the same matter, including common law tort claims predicated on design defects.

Id. at 387 (explanation and emphasis added). It is thus clear that based upon *Southern Ry. Co.* and its progeny, including *Carrillo*, that field preemption under the SAA is just as viable and important to achieving Congress's goal of national uniformity of regulation in the railroad industry as preemption under its "sister statute," the LIA.

Both Petitioner and the government recognize that the LIA and SAA are one and the same in their respective fields. Petitioner points out that "[i]n light

of their similarities," courts have treated the LIA and SAA in like fashion with regard to the "in use" limitation (the merits of which are discussed in detail below). (Pet. Br. 25 n.22). Likewise, the government, again discussing the "in use" theory, compares this Court's interpretation of the LIA and the SAA and states that the SAA "***similarly*** regulates the 'use' of vehicles on 'railroad lines.'" (U.S. Br. 15 (emphasis added)).

Here, while Petitioner's claims fall only within the purview of the field preemptive scope of the LIA, the implications of this Court's decision will necessarily affect field preemption analysis under the SAA as well. Thus, the judgment of the court of appeals should be affirmed, and it should be made clear that the same reasoning applies to cases in which SAA field preemption is at issue.

II. THE ARGUMENTS ADVANCED BY PETITIONERS ARE UNWORKABLE AND, IF ACCEPTED, WOULD BE EQUIVALENT TO A RETROACTIVE PENALTY AGAINST RAILROADS AND EQUIPMENT MANUFACTURERS

A. The "In Use" Argument Lacks Merit

Petitioners claim that the LIA only regulates locomotives that are "in use on a railroad line," and thus, the field preemptive scope of the LIA does not extend to locomotives and locomotive parts while they are being repaired or installed off-line. (Pet. Br. 19-28). In other words, Petitioners posit that states

should be able to regulate a locomotive's design, construction, parts, and materials when a locomotive is being repaired, while the FRA exclusively regulates that same locomotive's design, construction, parts, and materials when it is "in use." That analysis is erroneous and the cases addressing the issue have rejected the argument. The federally preempted field is defined not by ***where*** the regulation is applied but by the physical "object" that is regulated. *Napier*, 272 U.S. at 611-13. The physical object of the state regulation is the locomotive and the design, construction, and material of its parts. Therefore, any state regulation directed at that ***object*** is preempted. *Id.*

Petitioners' tortured reading of *Napier* does not change this fact. Petitioners claim that "*Napier* reflects the 'in use' limitation on the LIA's regulatory scope." (Pet. Br. 37). This "reflection," however, is simply a product of Petitioners selectively italicizing only certain language from the opinion and deemphasizing other language. According to Petitioner, the important language in *Napier* is "used on," "for service," and "for operation." (*Id.*) On the contrary, the Court's point in *Napier* was that the field preempted is defined by the ***object*** regulated, not the location of that object. *Napier*, 272 U.S. at 612 ("The federal and the state statutes are directed to the same subject – ***the equipment of locomotives***. They operate upon the same ***object***." (Emphasis added)). Thus, the operative words in the passages from *Napier* that Petitioner quotes are actually "locomotive," and "equipment." State regulation of these objects is thus

preempted, regardless of whether they are "in use" when the regulation is implemented.

Moreover, the idea that a locomotive must be "in use" for LIA field preemption to apply is unworkable. In fact, it is impossible. A locomotive's design, parts, construction, and materials do not change when the locomotive goes from being "in use" to being repaired. Thus, it is no wonder that the argument has been soundly rejected by every court deciding the issue. *See, e.g., Seaman*, 707 N.Y.S.2d at 302 (explaining that it is "irrelevant whether the plaintiff was exposed to asbestos from locomotives in use or off-line, because a locomotive's design, construction, parts and materials, which are regulated by the LIA, are the same whether or not the locomotive is in use"); *Darby v. A-Best Prods. Co.*, 2002 WL 31839197 (Ohio App. Jan. 15, 2003), *aff'd*, 811 N.E.2d 1117 (Ohio 2004), *cert. denied*, 543 U.S. 1146 (2005); *Frastaci v. Vapor Corp.*, 158 Cal. App. 4th 1389 (2007); and *Ransford v. Griffin Wheel Co., Inc.*, 2009 WL 1994740 (Cal. App.), *cert. denied*, 130 S.Ct. 1691, 176 L.Ed.2d 181 (March 1, 2010).

Petitioner makes a textual argument in support of the "in use" theory, stating that "[t]he text and structure of that provision make plain that it applies only to the 'use' of a locomotive 'on [a] railroad line.'" (Pet. Br. 21). This argument is misplaced. Field preemption results not simply from the statute's text but from the dominance of the federal interest and the statute's purpose, structure, and pervasiveness. *See Pennsylvania v. Nelson*, 350 U.S. 497, 502-04 (1956).

Thus, the LIA's occupation of the field – and necessarily the scope of that field – is discerned from the "broad scope of the authority conferred upon the [FRA]" over "the design, the construction and the material of every part of the locomotive," and the requirement of national uniformity. *Napier*, 272 U.S. at 611, 613; *Law v. General Motors Corp.*, 114 F.3d 908, 910-12 (9th Cir. 1997); *Oglesby v. Delaware & Hudson Railway Co.*, 180 F.3d 458, 462 (2nd Cir. 1999), *cert. denied*, 528 U.S. 1004 (1999). State-by-state regulation concerning the design, construction and material of locomotives infringes on that authority and disrupts the uniformity of the federal regulatory regime, and as such, it is preempted whether or not the locomotive is "in use."

Even under a purely textual analysis, however, Petitioners' argument fails when the full text of the LIA is examined. Both the LIA and the SAA contain the following language: "a railroad carrier may use ***or allow to be used*** . . . on its railroad line. . . ." 49 U.S.C. §§ 20701, 20302 (emphasis added), *supra* at 6-7. Petitioner relies exclusively upon the "use . . . on its railroad line" language while paying no heed to the "allow to be used" language. (Pet. Br. 21). Thus, by the rationale employed by Petitioner, a complete reading of the text of the statutes actually shows that the safety requirements in the LIA and SAA apply *not* only to the ***use*** of a locomotive, but also to the ***allowing*** (*i.e.*, inspection, repair, replacement) of locomotives to be used.

The LIA is, after all, the "Locomotive Boiler ***Inspection*** Act." The Act itself commands that a locomotive must be inspected, tested and repaired in order to be used at all on line. 49 U.S.C. § 20701(2). The LIA specifically requires the FRA to "inspect every locomotive and tender and its parts and appurtenances." 49 U.S.C. § 20702(a)(2). As Petitioner acknowledges (Pet. Br. 22-23), the FRA is required to "ensure that every railroad carrier . . . repairs every defect that is disclosed by an inspection ***before*** a defective locomotive, tender, part, or appurtenance is used again." 49 U.S.C. § 20702(a)(3) (emphasis added). The FRA is also required to regulate the carriers' own inspections. 49 U.S.C. § 20702(c)(1). Pursuant to that authority, the FRA mandates that numerous parts be "removed," "cleaned," "repaired," "replaced," "inspected," and "maintained" by railroads.[4] All of this

---

[4] Regulations under LIA require daily inspections (49 C.F.R. § 229.21); thorough inspection and testing of gauges, electrical devices, insulation, steam generators, and other components every three months (49 C.F.R. § 229.23-25 and Form FRA F180-49A); and further tests annually and biennially. (49 C.F.R. § 229.27-31). Under these regulations, for example, brake components must be "cleaned, repaired or replaced," a steam-generator component must be "removed and inspected," the main reservoir must be "hammer tested over its entire surface," "all internal and external surfaces" inspected at specified intervals and a periodic inspection must be performed annually. 49 C.F.R. §§ 229.27, 229.31; *Lilly v. Grand Trunk R.R.*, 317 U.S. 481, 486-87 (1943) (approving rules under LIA requiring water tanks to "be maintained free from leaks," "inspected" and "cleaned, if necessary" at least once a month and cab aprons to be "maintained in a safe and suitable condition").

occurs while the locomotives are off-line. It makes no sense that the locomotive parts and appurtenances suddenly cease to be within the field preempted by the LIA while undergoing inspection and repairs ***that are required by the LIA itself***.

Petitioner also relies upon several FELA cases to support the "in use" distinction. (Pet. Br. 23-27). As Petitioner admits, those cases involved injured employees attempting to hold an employer liable for a violation of the LIA or SAA. (Pet. Br. 26-27). The employees in those cases brought claims under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51, *et seq.* (a federal, not state-law duty) based on a supposed breach of the railroad's duty to maintain the locomotive even though the locomotive was off-line. None of the cases involve products liability or preemption at all. *See, e.g., Brady v. Terminal R.R.*, 303 U.S. 10, 13 (1938); *Baltimore & Ohio R.R. Co. v. Hooven*, 297 F. 919, 921, 923 (6th Cir. 1924); *New York, C. & St. L.R.R. Co. v. Kelly*, 70 F.2d 548, 551 (7th Cir. 1934); *Wright v. Arkansas & Mo. R.R.*, 574 F.3d 612, 620 (8th Cir. 2009); *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838, 842 (1st Cir. 1998); *Crockett v. Long Island R.R.*, 65 F.3d 274, 277 (2d Cir. 1995); *Estes v. Southern Pac. Transp. Co.*, 598 F.2d 1195, 1198-99 (10th Cir. 1979); *Tisneros v. Chicago & N.W. Ry.*, 197 F.2d 466, 467-68 (7th Cir.), *cert. denied*, 344 U.S. 885 (1952); *Deans v. CSX Transp., Inc.*, 152 F.3d 326, 328-29 (4th Cir. 1998); *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187, 188 (5th Cir. 1991); *Angell v. Chesapeake & Ohio Ry.*, 618 F.2d 260, 262

(4th Cir. 1980); *Pinkham v. Maine Cent. R.R. Co.*, 874 F.2d 875, 881 (1st Cir. 1989); and *Steer v. Burlington N., Inc.*, 720 F.2d 975, 976-77 (8th Cir. 1973). (Pet. Br. 23-27). These cases simply reflect that the in use/off-line distinction is only relevant for the simple common sense reason that a side-lined locomotive need not be fit to operate. That has to be the law; if a locomotive had to be fit to operate when not in use, it could never be serviced. *See Lyle v. Atchison, T. & S.F. Ry. Co.*, 177 F.2d 221, 223 (7th Cir. 1949) (it is "opposed to reality" to require locomotive be already repaired and maintained when it goes off-line to be repaired and maintained); *Phillips v. CSX Transp., Inc.*, 190 F.3d 285, 288 (4th Cir. 1999) ("the purpose of the 'in use' limitation is to give railcar operators the opportunity to inspect for and correct safety appliance defects before the [SAA] exposes the operators to strict liability for such defects"); *Id.* at 288, n.2 ("because the 'in use' language in the [LIA] is identical to the language in the [SAA], courts have applied caselaw interpreting the [LIA] to the [SAA], as well"). The railroad's absolute duty to maintain its equipment has nothing whatsoever to do with preemption or common law design claims. Indeed, the LIA preempts state law where the absolute duty to maintain does not apply at all. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983) (Kennedy, J.) (holding that railroad owes no duty to maintain experimental devices, but state regulation of them is preempted). Thus, there is no such thing as an "off-line" design for the state to regulate. The locomotive design, construction and parts necessarily remain

within the scope of the FRA's authority whether they are "in use" or not.

Petitioner is simply wrong on this point. It is not possible to allow states to regulate the makeup of an off-line locomotive while preventing them from regulating the makeup of that same locomotive when it happens to be "in use," and no case endorses such a proposition. *Napier* clearly determined that the LIA preempts the field of the design, construction and materials of every part of the locomotive. 272 U.S. at 611-13. Any claim that attacks the design, construction and materials of locomotive parts, such as the claim at issue in this case, falls squarely within the preempted field. As such, Petitioner's argument on this point should be rejected, and the judgment of the court of appeals should be affirmed.

B. LIA Field Preemption Applies to Claims Against Manufacturers

Petitioners also argue that the LIA does not preempt claims against railroad equipment manufacturers arising prior to 1988. (Pet. Br. 28-31). This position is without merit, and it is incongruous with the goal of LIA field preemption.

As both Respondents and the government aptly discuss, Congress's goal of national uniformity under the LIA would clearly be undermined if states were allowed to simply move one step up the supply chain and regulate the manufacturers and distributors of locomotives and locomotive parts that supply

products to railroads. (Res. Br. 42-44; U.S. Br. 27-29). It makes perfect sense that claims against manufacturers and distributors should fall within the preempted field when you consider the fact that "preemption analysis 'focuses not on whom the legal duty is imposed, but on whether the legal duty constitutes a state law requirement' already covered by federal law." *Law v. General Motors Corp.*, 114 F.3d 908, 912 (9th Cir. 1997), quoting *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 561 n.3 (9th Cir. 1995). Much like the "in use" argument discussed above, Petitioners' assertion on this point fails because it is just as irrelevant to consider ***against whom*** the state regulation is enforced as ***where*** the regulation is implemented. This Court has clearly held that the relevant inquiry for purposes of LIA field preemption is whether the state and federal regulations are "directed to the same subject – ***the equipment of locomotives***" and whether "[t]hey operate upon the same ***object***." *Napier*, 272 U.S. at 612 (emphasis added). It is thus no surprise that this argument has been widely rejected by both state and federal courts. *See, e.g., Law*, 114 F.3d at 910-912; *Forrester v. American Dieselectric, Inc.*, 255 F.3d 1205, 1210 (9th Cir. 1999); *Oglesby v. Delaware & Hudson Railway Co.*, 180 F.3d 458, 462 (2d Cir. 1998), *cert. denied*, 120 S.Ct. 498 (1999); *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 244 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *Scheiding v. General Motors Corp.*, 993 P.2d 996, 1003-04 (Cal. 2000), *cert. denied*, 531 U.S. 958 (2000); *Darby v. A-Best Products Company*, 811 N.E.2d 1117, 1125 (Ohio 2004), *cert. denied*,

543 U.S. 1146 (2005); *In Re: West Virginia Asbestos Litigation*, 592 S.E.2d 818, 823-24 (W. Va. 2003), *cert. denied sub nom., Abbott v. A-Best Products Company*, 549 U.S. 823 (2006); *General Motors v. Kilgore*, 853 So.2d 171, 175-76 (Ala. 2002); *Wright v. General Electric Co.*, 242 S.W.3d 674, 680-82 (Ky. Ct. App. 2007); *Seaman v. A.P. Green Industries, Inc.*, 707 N.Y.S.2d 299, 300-03 (N.Y. Sup. Ct., 2000); *Bell v. Illinois Central R.R. Co.*, 236 F. Supp. 2d 882, 890-91 (N.D. Ill. 2001); and *D'Amico . v. Garlock Sealing Technologies, LLC*, 2007 WL 2702774, *6-7 (E.D. Pa.).

The lone case cited by Petitioners that holds otherwise, *Lorincie v. Southeastern Pennsylvania Trans. Auth.*, 34 F. Supp. 2d 929 (E.D. Pa. 1998), was wrongly decided. As Petitioners do here, that case misconstrued the intent and goals of the LIA by incorrectly focusing on to whom the Act applies, rather than the purposes for which it was enacted. Also, *Lorincie* relied heavily on *Viad Corp. v. Superior Court*, 55 Cal. App. 4th 330, 64 Cal.Rptr.2d 136 (1997), and *Oglesby v. Delaware Hudson Ry. Co.*, 964 F. Supp. 57 (N.D. N.Y. 1997), neither of which is good law. *Viad* was overturned in 2000 by the California Supreme Court in *Scheiding*, 993 P.2d at 1004 n.6, and the district court *Oglesby* decision cited in *Lorincie* was later reversed by the Second Circuit in *Oglesby*, 180 F.3d 458. Thus, *Lorincie* provides no credible support for Petitioners' argument, and it is certainly no basis for reversing the judgment of the court of appeals.

C. The Retroactive Effect of Overturning *Napier* would be Contrary to the Doctrine of *Stare Decisis*

While Petitioners urged this Court to overrule *Napier* in their petition for certiorari (Pet. 36-40), they do not renew that argument in their merits brief. (U.S. Br. 12 n.3). Rightfully so, as such a result is unsupported by law and would run contrary to the doctrine of *stare decisis*. This is especially true when it comes to LIA field preemption. As Respondents point out, *Napier*'s construction of the LIA's preemptive scope is entitled to "especially strong 'statutory *stare decisis*' force," because Congress at any point could have amended the LIA to change its preemptive effect and chose not to do so. (Res. Br. 29, citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008); and *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008)).

Napier's continued vitality is evidenced by an "avalanche" of authority holding that the LIA must continue to be given a broad field preemptive effect. *Frastaci v. Vapor Corp.*, 158 Cal. App. 4th 1389, 1403 (2007) (stating that its finding of preemption was "consistent with an avalanche of state and federal court decisions holding firm to the *Napier* principle that the LIA preempts state tort actions"); *In Re: West Virginia Asbestos Litigation*, 592 S.E.2d at 822 ("an overwhelming body of case law" persuaded the court that Congress, through the LIA had occupied the field such that the plaintiff's asbestos claims were preempted and that any other decision was "blocked

by an avalanche of adverse authority"). Indeed, the field preemptive effect of the LIA, as set forth in *Napier*, has been upheld in virtually every jurisdiction to have decided the issue, with Pennsylvania being the lone exception. (Pet. *Harris* Br. 22-37).

Reversing the Third Circuit's decision would not only endanger the uniformity necessary to ensure railroad usage across state boundaries and create uncertainty in the railroad industry, it would apply a retroactive punishment against railroads and manufacturers. The certainty created by LIA field preemption under *Napier* has allowed locomotive and locomotive part manufacturers to design and build their products subject to one set of nationally uniform regulations, and that certainty and reliance should be left in place. Even with respect to asbestos, the railroads and manufacturers have relied on pronouncements from studies commissioned by the federal government and conformed their behavior accordingly. *See, e.g.*, U.S. Dep't of Transp., Report to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996), at 10-12;[5] Robert N. Thompson, *Air Quality in Baltimore and Ohio Trains Descending the Altamont-Piedmont Grade in West Virginia* (December 1972) (App. 1-9); J.F. Quealy & J.M. Wandrisco, *Report on Research Work FRA Purchase Order 810-4361, Asbestos Emissions from*

---

[5] *Available at* http://www.regulations.gov/#!documentDetail;D=FRA-2004-17645-0009.

Railroad Brake Shoes (July 1978) (App. 10-24); and U.S. Government Memorandum Regarding Brake Shoe Emission Test Reports (April 19, 1978) (App. 25-28). Overruling *Napier* would, in essence, punish railroads and manufacturers retroactively and afford them no chance to comply with a new and different pronouncement of law.

Allowing state court juries, based on varying state-by-state standards, to impose liability on railroads and manufacturers for warnings-based claims would result in the same unfair retroactive restriction on commerce. The government, however, posits a distinction between "defective product" claims and "failure to warn" claims, asserting the former are preempted while the latter are not. (U.S. Br. 25-26). No such distinction exists, and the government's position provides no basis for overturning *Napier* or otherwise circumventing its holding. This Court has recognized that "blackletter products liability law" makes a failure to warn, such as a defective label, itself a type of product defect. *Bruesewitz v. Wyeth LLC*, ___ U.S. ___, 131 S.Ct. 1068, 1087, 179 L.Ed.2d 1 (2011); *see generally* Restatement (Third) of Torts: Products Liability § 2 (1997) ("A product is defective when, at the time of sale and distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings."); Dan B. Dobbs, *The Law of Torts* § 363, p. 1004 (2000) ("a product is defective not only when it suffers from a manufacturing flaw or design but also when its manufacturer or distributor fails to provide a

reasonable warning for reasonably foreseeable harm"); and American Law of Products Liability 3d § 32:2 (2004) (the failure to give a warning when required "is itself a defect"). The government's position thus does not comport with basic tenets of products liability law.

In addition, a warnings claim necessarily presents threshold questions as to the safety of a product's design, including whether the design must be changed. Before the law will sanction curing a product defect by use of a warning, a manufacturer is first required to design the defect out of the product. *See* Restatement (Third) of Torts: Products Liability § 2 cmt. 1 (1997) ("In general, when a safer design can reasonably be implemented and risks can be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks." In other words, "[w]arnings are not . . . a substitute for the provision of a reasonably safe design."); Dobbs, *supra*, at 1005 ("even the very best warning does not remedy the design defect" that could be reasonably designed out of the product). The government's suggestion that warnings claims are "unlikely to be preempted because they would not require manufacturers of locomotives or railroads to alter the design or construction of their locomotives – and, therefore, would not conflict with the LIA," is thus erroneous. (U.S. Br. 26). When those legal realities are considered, it is apparent that state regulation of warnings would disrupt the Congressional goal of national uniformity just as much as any other

type of state regulation, and such claims are thus preempted.

The proposed distinction between "warnings" claims and "defective product" claims is also unworkable on a practical level. The government admits that "different States might impose different warning requirements," but suggests that "variance among required warning labels would not have the effect of imposing non-uniform standards about whether locomotives are safe to operate" because "manufacturers or railroads may either affix the most stringent form of a warning required by any particular State or affix a label that incorporates requirements imposed by several States." (U.S. Br. 27). However, if states are allowed to "impose different warning requirements," it stands to reason that states could also ***change*** those requirements at any time. Thus, a railroad or manufacturer who is abiding by the most stringent state's standards today could be in violation of that state's (or another's) ***more*** stringent standards tomorrow. This theory of state-by-state warnings regulation also contradicts the government's assertion that "[m]anufacturers and railroads may post warnings in repair shops themselves (which obviously do not move from State to State) or on the packaging for the materials in question." (U.S. Br. 27). For example, if a manufacturer places warnings on packaging because the most stringent state law requires it, what is to keep a jury in another state from finding that the warnings should have instead been placed on the repair shop walls? If a railroad places warnings

on both packaging and repair shop walls to "incorporate requirements imposed by several States," as the government suggests, what is to keep another jury in the same or another state from finding that a warning also needed to be placed on the product itself? Avoiding such inevitably ever-changing and conflicting standards is the whole purpose of having a nationally uniform regulatory scheme, and such a system cannot exist where states are allowed to regulate within the preempted field. Warnings claims fall squarely within that field. Therefore, the Court should uphold the national uniformity of regulation created by LIA field preemption under *Napier* and affirm the court of appeals' judgment.

CONCLUSION

The LIA and SAA are sister statutes enacted with the same Congressional intent as part of the dominant federal regulation of the railroad industry. Both have been given a broad field preemptive effect by this Court for nearly a century. This Court's resolution of the LIA field preemption issue presented in this case necessarily directly affects the issue of field preemption under the SAA, as presented in *Harris*. Based on the arguments and authorities above, as well as those in Respondents' brief and briefs of *amici* in support of Respondents, GWC respectfully urges

the Court to affirm the judgment of the court of appeals.

Respectfully submitted,

LARRY D. OTTAWAY
Counsel of Record
MONTY B. BOTTOM
ANDREW M. BOWMAN
FOLIART, HUFF, OTTAWAY & BOTTOM
201 Robert S. Kerr Avenue,
Suite 1200
Oklahoma City, Oklahoma 73102
Telephone: (405) 232-4633
Facsimile: (405) 232-3462

Attorneys for Amicus Curiae
Griffin Wheel Company

AIR QUALITY IN BALTIMORE AND OHIO TRAINS DESCENDING THE ALTAMONT – PIEDMONT GRADE IN WEST VIRGINIA

An investigation for the Federal Railroad Administration conducted by the FAA Aeronautical Center Industrial Hygiene Section, Oklahoma City, Oklahoma

DECEMBER 1972

SUBMITTED BY /s/ Robert N. Thompson
ROBERT N. THOMPSON, Ph.D.
Chief, Industrial Hygiene Section

INTRODUCTION

On 28-29 November 1972, acting upon a request from the Federal Railroad Administration's Office of Safety, air quality tests were made by the FAA, Aeronautical Center, Industrial Hygiene Section, in Baltimore and Ohio (B&O) Railroad caboose cars near Cumberland, Maryland. This investigation was conducted in response to a complaint filed with the State of Maryland, Department of Mental Health and Hygiene alleging that smoke produced during prolonged braking of railroad cars may be hazardous to the health of employees riding in caboose cars. The air in the cars was sampled in an attempt to identify and quantify the particulate and vapor fractions of the subjectively detectable material and to assess the effect that such products might have on the occupants.

PROCEDURE

The site selected for the tests is on the B&O line between Altamont, W. Virginia and Piedmont, a seventeen mile section of track descending on an approximate 2.0% grade. Trains negotiating this grade apply brakes for virtually the entire distance and apparently in the process create considerable smoke which is readily visible outside the trains. There was speculation by some that the smoke may have been caused wholly or in part by burning flange lubricant on the tracks.

Tests were performed on four trains; a manifest train, two coal drags, and a grain train in that order. The first two trains were boarded at Altamont and the last two at Mountain Lake Park, Md. Air sampling inside the caboose cars began at Altamont and ended at Piedmont on each run.

SAMPLING

In conversations with brake shoe manufacturer's representatives, we learned something of the probable contents of the composition shoes. Though general due to its proprietary nature, the information did provide some clues to the pyrolysis products we might expect to find in our sampling activities.

One obvious requirement in this type of investigation is that all of the sampling equipment must be portable and battery or hand powered. Consequently, we resorted to the use of (1) direct reading gas

detector tubes and (2) personal samplers for vapor and particulate collection.

(1) Direct reading gas detector tubes were used to measure sulfur dioxide (SO_2), carbon monoxide (CO) ammonia (NH_3) and styrene ($C_6H_5CH{:}CH_2$) any or all of which could have been present in the caboose air. In this sampling method, a metered quantity of air is aspirated through a glass tube containing a chemical selected to react with a specific gas or vapor. The reaction produces a color change in the tube contents, the length of which is proportional to the concentration of the gas in the sample of air.

(2) Personal samplers are small battery operated pumps which attach to the wearers clothing and aspirate air from his breathing zone at a constant flow rate throughout the sampling period.

One sampler was used to draw air through a tared membrane filter having a pore size of 0.45 micron (μ). The particulates trapped on the filter surface were returned to the FAA, Aeronautical Center, Industrial Hygiene Laboratory where they were weighed and then examined with a light microscope for identification and sizing.

Another sampler was used for vapor collection by drawing air through a 127mm x 6mm glass tube containing activated charcoal. These tubes were

sealed after sampling and returned to the laboratory where they were desorbed with carbon disulfide and analyzed on a gas-liquid chromatograph using a flame ionization detector.

RESULTS

On the first run, a manifest train, we detected no contamination in the caboose either subjectively or by test.

On the second run, the smoke became very dense and visibility in the caboose was severely restricted. Although it was certainly an annoying condition, we did not find it irritating or restrictive to our breathing throughout the fifty minute sampling period.

We would classify smoke concentrations on the third and fourth runs as medium and light respectively when compared with the conditions encountered in the second run.

On the basis of our observations and tests, we conclude that the smoke arises from the "burning" of the brake shoes and that little, if any, comes from burning flange lubricant.

The gas, vapor and particulate sampling results are recorded on page 8.

GASES AND VAPORS

The only contaminant present in measurable amounts using the direct reading gas detector tubes was carbon monoxide. It was detected during each run, but only in trace (T) quantities, less than 10 parts per million parts of air sampled (ppm). The other gases i.e. SO_2, NH_3 and styrene, if present, were in concentrations too low to measure by this method.

The activated charcoal – gas chromatography method used for collection and analysis of vapor contaminants is extremely sensitive to low concentrations. Only during the second run did we collect any measureable, though minute, quantity of material. A chromatographic "finger-print" of this sample bore a strong resemblance to a similar chromatogram of pyrolyzed brake shoe material. Although the components of the sample represent physiologically insignificant air-borne concentrations of contaminants that could be emitted from the brake shoes, we are continuing with tests to identify and quantify each.

PARTICULATES

Particulate concentrations ranged from 0 milligrams per cubic meter (mg/M^3) of air sampled on the first run to 19.75 mg/M^3 on the second run. Microscopic examination of the filters revealed that virtually all of the collected material was black smoke particles (soot) ranging in size from <1 micron (1/25,000 inch) to 6 micron. We saw no asbestos fibers on any of the filters.

CONCLUSIONS

Air quality standards of the Occupational Safety and Health Administration (OSHA) established by the Federal Occupational Safety and Health Act of 1970 contain air-borne concentrations of substances to which it is believed that nearly all workers may be repeatedly exposed day after day (8 hr), week after week (5 days) without adverse effect. They are time-weighted concentrations which means that excursions above the limit may be permitted provided they are compensated by equivalent excursions below the limit during the work day. These threshold limit values (TLV's) are based on the best available information from industrial experience, from experimental human and experimental animal studies, or possibly combinations of the three.

Threshold limit values for all air-borne substances sampled directly on the trains are included in the table on page 8. Only the TLV for nuisance particulates of 10mg/M^3 was exceeded during the 50 minutes of sampling on run number two when the concentration reached 19.75 mg/M^3. However, a time-weighted average for an 8 hour period which included only one such exposure, or even two, would fall far below the TLV. The 50 minute excursion above the TLV would be easily compensated by the much longer exposure to air not contaminated with the smoke. This sample which was collected in the caboose of a long coal drag probably represents the worst condition of this particular smoke problem that would be encountered on this line.

Asbestos, which is an important ingredient in brake shoes, was not detected in its hazardous (fibrous) form in any of the air samples. When subjected to temperatures of 900°F, fibrous asbestos is reduced to a relatively inocuous [sic] powder.

Carbon monoxide, traces of which were detected on each run, is probably traceable to the heaters used in the cars.

We have checked TLV's for other substances which may be degradation products of pyrolyzed composition brake shoes such as phenols and formaldehyde and find that the concentrations of our chromatographically separated charcoal tube sample components are far below such limits.

In summary, air sampling in caboose cars of four B&O trains descending the grade from Altamont, W. Virginia to Piedmont, W. Virginia revealed only traces of CO and no measurable amount of SO_2, NH_3 and styrene. During one run the TLV for nuisance particulates was exceeded briefly but not significantly when the period of exposure was considered. Other collected vapor components of the brake shoe smoke were present in only trace quantities and not physiologically significant.

The infrequent and brief exposures to the smoke in the caboose cars obviates the development of a health hazard to the train crews.

The smoke is visible and annoying but not a cause for concern. We recommend that measures be

initiated to eliminate or control this nuisance and offer the following alternatives:

1. De-activate the brakes on the caboose cars and possibly on one or two cars forward of them if safety procedures will permit. It is our belief that much of the smoke in the caboose comes from its own brakes.

2. Experiment with various window and door ventilation combinations in order to sweep smoke from the cars.

3. Equip the caboose cars with cartridge type respirators for the comfort of crews as they descend the grade.

SAMPLING DATA

DATE	TRAIN TYPE	CO ppm		SO_2 ppm		NH_3 ppm		STYRENE ppm		PARTICULATES mg/M^3		SMOKE APPEARANCE
		Test	TLV	Test	TLV	Test	TLV	Test	TLV	Test	TLV	
1/28/72	Manifest	T T	50	0 0		0	50	0 0	100	0	10	None
1/28/72	Coal	T T T	50	0 0		0	50	0	100	19.75	10	Heavy
1/29/72	Coal	T	50	0 0		0	50	0	100	9.75	10	Medium
1/29/72	Grain	T	50	0		0	50	0	100	2.93	10	Light

App. 10

Report on Research Work
FRA Purchase Order 810-4361

Asbestos Emissions From Railroad Brake Shoes

by
J. F. Quealy
and
J. M. Wandrisco

U. S. Steel Corporation
Research Laboratory
Monroeville, Pa. 15146

July 1978
Final Report

Prepared for

U. S. DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
Office of Rail Safety Research
Washington, DC 20590

Technical Report Documentation Page

1. Report No.	2. Government Accession No.	3. Recipient's Catalog No.
4. Title and Subtitle Asbestos Emissions From Railroad Composition Brake Shoes		5. Report Date July, 1978 6. Performing Organization Code
7. Author(s) J. F. Quealy and J. M. Wandrisco		8. Performing Organization Report No. 76-H-045 (018)
9. Performing Organization Name and Address U. S. Steel Corporation Research Laboratory Monroeville, Pa. 15146		10. Work Unit No. (TRAIS) 11. Contract or Grant No. P. O. 810-4361
12. Sponsoring Agency Name and Address U. S. Department of Transportation Federal Railroad Administration Office of Rail Safety Research Washington, D. C.		13. Type of Report and Period Covered Final Report 14. Sponsoring Agency Code
15. Supplementary Notes		

16. Abstract

Samples of airborne emissions from three brands of composition railroad brake shoes were collected during tests on a full-scale-railroad-wheel-testing dynamometer under controlled conditions simulating a high-energy-dissipation braking. Asbestos-fiber concentrations, as measured by individual samples, ranged from zero to 0.067 fiber longer than 5 microns/cm^3 – far less than the current permissible occupational exposure limits of 2 fibers longer than 5 microns/cm^3 of air specified on the OSHA Asbestos Standards.

17. Key Words Asbestos Brake Shoes Composite Materials		18. Distribution Statement	
19. Security Classif. (of this report)	20. Security Classif. (of this page)	21. No. of Pages	22. Price

Conversion Factors

1 mph = 0.447 m/s

1 hp = 0.746 kW

1 rpm = 0.105 rad/s

1 inch = 25.4 mm

1 foot = 0.3048 m

1 lb = 4.45 N

1 ton = 0.907 tonne

Table of Contents

		Page
1.	Introduction	2
2.	Materials and Experimental Work	3
	2.1 Wheel-Testing Dynamometer	3
	2.2 Tests Conducted	3
	2.3 Air Sampling and Analysis	4
3.	Discussion and Summary	4

Tables

Table I – Asbestos Emissions From Composition Brake Shoes During Drag Braking 5

List of Figures

Figure 1 – View of Wheel-Testing Dynamometer U. S. Steel Research Laboratory, Monroeville, Pa. 6

Figure 2 – View Showing 33-Inch-Diameter Wheel in Dynamometer 7

Figure 3 – Portable Air-Sampling Pump and Filter Cassette 8

Figure 4 – View Showing Sampling Pumps Located 6 Inches and 6 Feet From Brake Shoe 9

Figure 5 – View Showing Sampling Pump Located 17 Feet From Brake Shoe 10

[2] Introduction

In recent years, the use of composition brake shoes instead of cast-iron brake shoes has been generally accepted by the railroad industry, and practically all cars being constructed have brake system components designed for the use of composition shoes. Also, the brake-system components in many of the older cars in service are being modified so that composition shoes can be used. Modification of older cars is necessary because with composition shoes only half the brake-shoe pressure needed with cast-iron shoes is required to produce the same retardation. The average coefficient of friction of composition shoes is about 0.30, whereas that of cast-iron shoes is about 0.15. Consequently, the railroad favors the use of composition shoes because of their greater braking efficiency.

There are three principal suppliers of composition brake shoes to the domestic railroad industry. Each manufacturer has developed a brake shoe containing various components that are bonded together by resin compounds. Their compositions are considered proprietary, but the service performance of all types has been similar.

Inasmuch as one of the components of composition brake shoes was reported to be asbestos, the subject study was proposed by the Federal Railroad Administration, Office of Rail Safety Research, because of concern that the airborne emissions that result from decomposition of the brake shoes during

braking might contain sufficient asbestos fibers to create a health hazard.

The criterion for determining whether a health hazard exists is the present OSHA Asbestos Standard which establishes a permissible occupational exposure limit of 2 fibers longer than 5 microns per cubic centimetre of air, based on an 8-hour time-weighted average exposure. The Standard also states that exposures shall not exceed 10 fibers/cubic centimetre for any period during the workday. OSHA has proposed to reduce the 8-hour exposure limit to O.S fiber/cm^3, with a ceiling-limit of 5 fibers/cm^3, as determined over a period of up to 15 minutes.

[illegible] Materials and Experimental Work

Wheel-Testing Dynamometer

The railroad wheel-testing dynamometer at the U. S. Steel Research Laboratory in Monroeville, Pennsylvania was used to perform controlled tests of simulated railroad braking conditions with composition brake shoes. Samples of airborne emissions were obtained both under confined atmospheric conditions and under conditions simulating the actual turbulent-air-mixing effects resulting from train operations.

The wheel-testing machine, Figure 1, is a large inertia dynamometer driven by a mill-type electric motor with a power output up to 450 hp and speeds up to 1500 rpm. Standard full-scale railroad wheels

from 30 to 40 inches in diameter can be tested, Figure 2, under conditions of loading and braking that simulate normal existing railroad service, or under exaggerated conditions of loading and braking far in excess of those encountered in service.

Tests Conducted

For the tests used in this study, a high-energy-dissipation braking condition known as drag braking was simulated so that a sustained heat buildup would occur and the brake shoe would decompose at a relatively high rate. This drag braking is similar to that which would occur in normal railroad service when a loaded 70-ton car with 33-inch-diameter wheels is retarded in descending a grade. The dynamometer was fitted with a 33-inch-diameter wheel and a single composition brake shoe. A braking force of 1500 pounds was exerted by the shoe onto the wheel tread for 50 seconds of each minute for a duration of 9 minutes, with the equivalent translatory speed of the wheel maintained at 45 miles per hour. The energy-dissipation rate for these conditions was 50 hp. During the tests, air samples were simultaneously collected for analysis, as will be described in a later section, at locations 6 inches, 6 feet, and 17 feet from the brake shoe, Figures 3, 4, and 5.

Similar tests were conducted with brake shoes of the compositions produced by the three principal manufacturers, which are designated in this report as A, B, and C. Each type of brake shoe was also tested

under two different air-circulation conditions, the first with the wheel rotating in nonturbulent air, and the second in a turbulent-air condition produced by an exhaust fan to simulate braking of a train in motion.

[4] Air Sampling and Analysis

Air samples were collected and analyzed in accordance with the USPHS/NIOSH membrane-filter method for evaluating airborne asbestos fibers. Samples were collected by drawing air at a rate of 2.0 litres per minute through a cellulose ester membrane filter (Millipore Type AA, O.B micron pore size) by means of a battery-powered personal sampling pump. During sampling, the top cover of the plastic filter cassette was removed to provide an even particle distribution over the entire filter. Sampling pumps were calibrated immediately, prior to, and after, the survey.

After collection, a wedge-shaped section was taken from each filter, rendered transparent in a one-to-one solution of dimethyl phthalate and ethyl oxalate, and examined for asbestos count and characteristics under phase-contrast microscopy at 450X magnification.

The asbestos-fiber-count procedure consists of comparing fiber length with calibrated circles, and counting all fibers greater than 5 micrometres in length within a given counting field area. The Porton reticle, a glass plate inscribed with a series of circles

and rectangles, is used for this purpose. The reticle, placed in the eyepiece of the microscope, is calibrated with a stage micrometer. The square on the left side of the reticle, divided into six rectangles, is defined as the counting field.

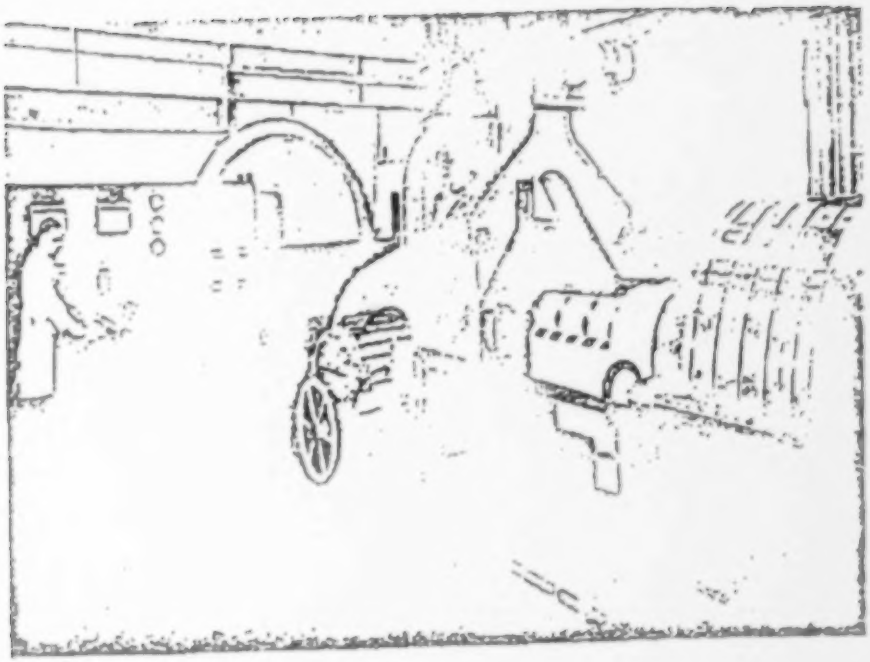
Discussion and Summary

As is shown in Table I, the airborne asbestos concentrations emitted during simulated severe railroad drag braking by each of the brake-shoe compositions tested were negligible. The measured concentrations were in the range zero to 0.067 fiber/cm^3, far lower than the permissible limits of both the present and proposed OSHA Asbestos Standard. One hundred counting fields were examined on each sample filter, and at most, only one fiber was observed per 100-field area. These extremely low fiber counts may possibly be attributed to background levels alone.

Table I

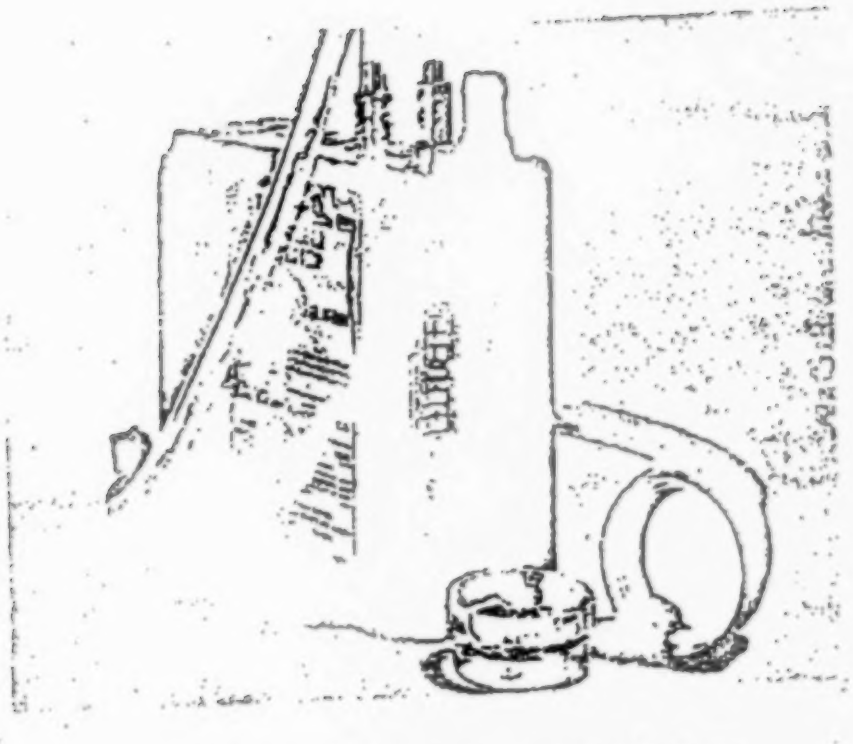
Asbestos Emissions From Composition
Brake Shoes During Drag Braking
Energy Dissipation Rate, 50 hp
Sampling Duration, 9 minutes

Air Circulation Past Wheel	Sample Collection Distance From Brake Shoe	Asbestos Concentration for Different Brake Shoes, fibers/cm^3		
		A	B	C
None	6 inches	0.000	0.000	0.000
None	6 feet	0.000	0.067	0.067
None	17 feet	0.000	0.067	0.067
Turbulent	6 inches	0.000	0.000	0.067
Turbulent	6 feet	0.000	0.000	0.000
Turbulent	17 feet	0.000	0.000	0.000



VIEW OF WHEEL-TESTING DYNAMOMETER
U. S. STEEL RESEARCH LABORATORY, MONROEVILLE, PA.

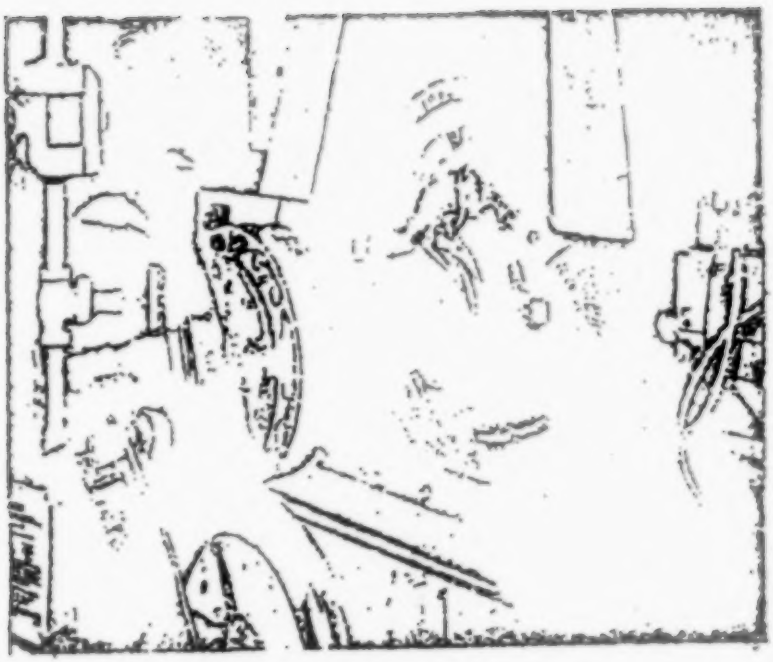
VIEW SHOWING 33-INCH-DIAMETER WHEEL IN DYNAMOMETER.



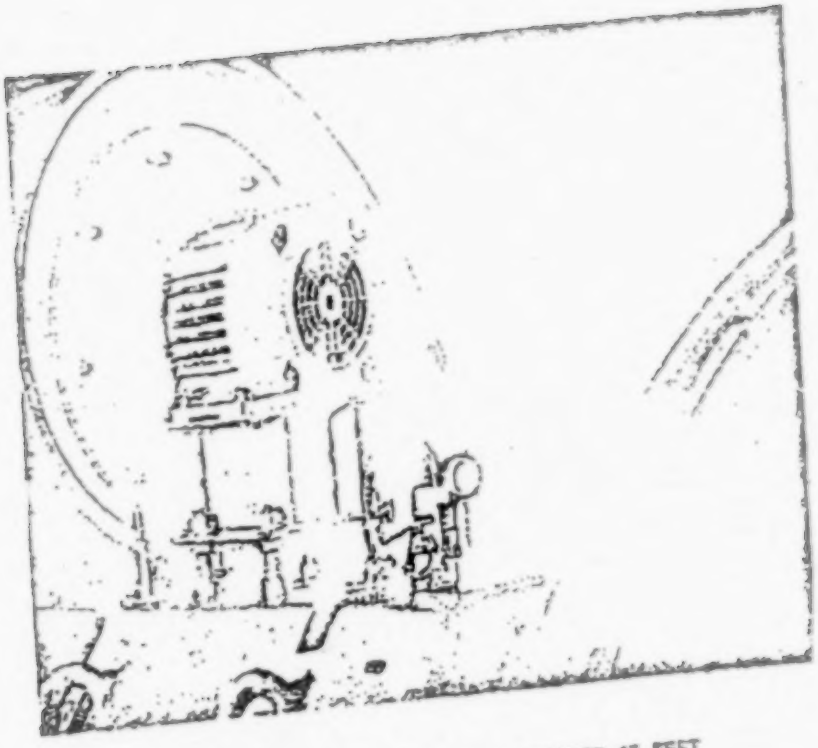
PORTABLE AIR-SAMPLING PUMP AND FILTER CASSETTE.

76-H-045(018)

Figure 3



VIEW SHOWING SAMPLING PUMPS LOCATED 0 INCHES AND 6 FEET FROM BRAKE SHOE.



VIEW SHOWING SAMPLING PUMP LOCATED 17 FEET FROM BRAKE SHOE.

Figure 5

UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT OF TRANSPORTATION

FEDERAL RAILROAD ADMINISTRATION

DATE: APR 19 1978

In reply
refer to RRD-33-528

SUBJECT: Brake Shoe Asbestos Emission Test Reports

FROM: Chief, Rail Vehicle Safety Research Division

TO: Director, Office of Rail Safety Research

The following reports were reviewed and are synopsized herein:

1) 1971 WABCO Dynamometer Tests (Cobra Brake Shoes)

2) June 1977, Johns Manville Study of the MBTA (Cobra Brake Shoes)

3) January 1978, Ryckman, Edgerly, Tomlinson and Associates, Study of Anchor Brake Shoes at ASF, Granite City, Ill.

4) February 1978, U.S. Steel Dynamometer Tests (Cobra, Anchor, and Comet Brake Shoes)

Summary

It is apparent from the nature of railroad operations that if train crews are exposed to airborne asbestos at

all, it would be for relatively short-term, intermittent time segments rather than continuously. In between these potential exposure periods, (i.e. when the train's brakes are being applied), levels would essentially be zero since no asbestos would be omitted. Accordingly, it is appropriate to compare all the measured test values to the ceiling concentration level further than the time-weighted average level since it is virtually impossible to exceed the latter.

All of the test results clearly indicate levels far below this ceiling concentration level. Based on these findings, it appears highly unlikely that train crews are subjected to adverse asbestos levels. The following thoughts are offered relative to the individual reports:

1) The 1971 WABCO study is extremely thorough and can not be faulted since at that time this method of reporting data was typical. Unfortunately the results, in their reported format, are not comparable to later tests.

2) The Johns Manville MBTA study points out several facts. As is the case with automotive brake repair shops, there does not appear to be any asbestos threat to car repairmen working around brake shoes in repair facilities. Nowhere else were significant amounts detected, however, in one case the amount of emissions measured outside the car near the brake were virtually the same as was measured inside the same car, during the same test, at a passenger seating position. One can only wonder if this has any significance in

terms of transmission of the fibers from outside the car to inside the car.

3) The U.S. Steel and the Ryckman, et. al/ASF Dynamometer tests yielded essentially the same findings. There were differences in sampling locations, fan location and size, and braking force, but the outcome was essentially the same – single brake shoes emit 0.7.-0.8% of the maximum allowable ceiling concentration level.

/s/ Don Devine
Don Devine

STUDY RESULTS

OSHA (1) Standards	1971 WABCO/Cobra Tests	1977 Johns Manville MBTA Study	1978 ASF/Anchor Tests	1978 U.S. Steel
T/A (2) – 2 fibers/cc C (3) – 10 fibers/cc	(4)	"Worst Case" .023 f/cc (5) 0.050 f/cc (6) .0097 f/cc (7) .0048 f/cc (8)	"Worst Case" 0.80 f/cc (9)	"Worst Case" .067 f/cc (10)

(1) Only fibers 5 microns in length or longer are counted. Conventional optical microscopy at 400-450x is used.
(2) TIME weighted average for 8 hours.
(3) Maximum allowable ceiling concentration (not to be exceeded for any time duration).
(4) Results of these tests were given in weight of asbestos omitted per brake application and are therefore not comparable to other tests. No fiber size descriptions or counts are given.
(5) Value observed in MBTA cars at various seating locations.
(6) Value observed on MBTA subway station platform.
(7) Value observed in a car house at inspection and maintenance areas.
(8) Value observed in ambient air outside car house.
(9) Measured 15 ft. downward of the shoe with a fan on. 6,000 lbs brake shoe load
(10) This value was observed for: Comet 6' frame shoe – fan off
3,000 lbs brake shoe load
17' frame shoe – fan off
Anchor 6' frame shoe – fan off
17' frame shoe – fan off
6" frame shoe – fan on

AMICUS CURIAE BRIEF

No. 10-879

IN THE

Supreme Court of the United States

GLORIA GAIL-KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, *et al.*,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF JOHN CRANE INC. IN SUPPORT OF RESPONDENTS

WILLIAM SMITH
WILLIAM R. ADAMS
DICKIE, MCCAMEY & CHILCOTE
Public Ledger Building, Suite 901
150 South Independence Mall, West
Philadelphia, PA 19106-3409

DANIEL J. O'CONNELL
MARK I. TIVIN
THOMAS J. BURNS
O'CONNELL, TIVIN, MILLER & BURNS
135 S. LaSalle Street, Suite 2300
Chicago, IL 60603

MICHAEL A. POLLARD
Counsel of Record
KATHLEEN T. SANDERSON
LINDSAY A. PHILIBEN
BAKER & MCKENZIE LLP
One Prudential Plaza
130 East Randolph Drive
Chicago, IL 60601
(312) 861-2786
Michael.Pollard@
bakermckenzie.com

Attorneys for Amicus Curiae

238517

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. Respondent Correctly Identifies the Scope of Preemption and the Proper Application of the Preemption Doctrine in the Third Circuit's Opinion 3

II. Accepting Petitioner's Arguments Will Upset the Settled Expectations of Railroad Parts and Equipment Manufacturers and Result in the Unfair Imposition of Retroactive Liability on those Manufacturers 4

CONCLUSION 17

TABLE OF CITED AUTHORITIES

Page

CASES

Amchem Prod., Inc. v. Windsor,
521 U.S. 591 (1997) 15

Atwell v. John Crane, Inc.,
986 A.2d 888 (Pa. Super Ct. 2009) 4

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 15

Caradonna v. A.W. Chesterton Co., Inc.,
2007 N.Y. Misc. LEXIS 8994
(N.Y. Slip Op. April 25, 2007)..... 11

Citizens United v. FEC,
130 S. Ct. 876 (2010) 13

City of New York v. Permanent Mission of India,
618 F.3d 172 (2d Cir. 2010) 16

CSX Transp., Inc. v. McBride,
131 S. Ct. 2630 (2011) 12-13, 14, 15

Darby v. A-Best Prods. Co.,
811 N.E.2d 1117 (Ohio 2004), *cert. denied,*
543 U.S. 1146 (2005) 9, 10

Eastern Enters. v. Apfel,
524 U.S. 498 (1998) 15

Cited Authorities

Page

First Sec. Bank v. Union Pac. R.R. Co.,
152 F.3d 877 (8th Cir. 1998) 11

Forrester v. American Dieselelectric, Inc.,
255 F.3d 1205 (9th Cir. 2001) 11, 13

Frastaci v. Vapor Corp.,
70 Cal. Rptr. 3d 402 (Cal. Ct. App. 2007) 8, 11

Gen. Motors Corp. v. Kilgore,
853 So. 2d 171 (Ala. 2002) 9, 10, 14

In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Ala. On Sep. 22, 1993,
188 F. Supp. 2d 1341 (S.D. Ala. 1999) 12

In re Train Collision at Gary, Ind.,
670 N.E.2d 902 (Ind. App. Ct. 1996), *appeal denied sub nom. Dillon v. Chicago Southshore & South Bend R.R. Co.*, 683 N.E.2d 591 (Ind. 1997), *cert. denied sub nom. Dillon v. Northern Ind. Commuter Transp. Dist.*, 522 U.S. 914 (1997) .. 12

In re West Virginia Asbestos Litig.,
592 S.E.2d 818 (W. Va. 2003), *cert. denied sub nom. Abbott v. A-Best Prods. Co.*, 549 U.S. 823 (2006) 10, 13

John Crane Inc. v. Atwell,
No. 10-272 (*petition for cert. filed* Aug. 23, 2010)..... 1, 4

Cited Authorities

Page

Key v. Norfolk S. Ry. Co.,
491 S.E.2d 511 (Ga. App. Ct. 1997) 12

Kurns v. A.W. Chesterton Inc.,
620 F.3d 392 (3d Cir. 2010) 9

Law v. Gen. Motors Corp.,
114 F.3d 908 (9th Cir. 1996) 11

Mickelson v. Mont. Rail Link, Inc.,
999 P.2d 985 (Mont. 2000) 12

Mo. Pac. R.R. Co. v. R.R. Comm'n of Tex.,
833 F.2d 570 (5th Cir. 1987) 11

Napier v. Atlantic Coast Line R.R. Co.,
272 U.S. 605 (1926) ..... *passim*

Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n,
413 A.2d 1037 (Pa. 1980) 4

Norfolk S. Ry. Co. v. Denson,
774 So. 2d 549 (Ala. 2000) 12

Oglesby v. Delaware & Hudson Ry.,
180 F.3d 458 (2d Cir. 1999), *cert. denied sub nom. Oglesby v. Gen. Motors Corp.*, 528 U.S. 1004 (1999) 11

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 13

Cited Authorities

Page

Rogers v. Mo. Pac. R. Co.,
352 U.S. 500 (1957) 14

Roth v. I & M Rail Link LLC,
179 F. Supp. 2d 1054 (S.D. Iowa 2001) 11-12

Scheiding v. Gen. Motors Corp.,
993 P.2d 996 (Cal. 2000), *cert. denied*,
531 U.S. 958 (2000) 10

Seaman v. A.P. Green Indus.,
707 N.Y.S.2d 299 (N.Y. Sup. Ct. 2000) 11

Southern R. Co. v. Lunsford,
297 U.S. 398 (1936) 8, 9

Springston v. Consol. Rail Corp.,
130 F.3d 241 (6th Cir. 1997), *cert. denied*,
523 U.S. 1094 (1998) 11

Stevenson v. Union Pac. R.R. Co.,
No. 4:07CV00522BSM, 2009 U.S. Dist.
LEXIS 6148 (E.D. Ark. Jan. 20, 2009) 12

Union v. Long Island R.R. Co.,
455 U.S. 678 (1982) 4

United Transp. Union v. Foster,
205 F.3d 851 (5th Cir. 2000) 10, 11

Urie v. Thompson,
337 U.S. 163 (1949) 5

Page

Wright v. Gen. Electric Co.,
242 S.W.3d 674 (Ky. App. Ct. 2007) 10, 13

STATUTES

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

49 U.S.C. § 20106 (2006) 6

49 U.S.C.S. § 20106(b) (Lexis 2010) 5

Act of Feb. 17, 1911, Pub. L. No. 61-383, ch. 103, § 2, 36 Stat. 913 (current version at 49 U.S.C. §§ 20701-20703 (2006)) 5

Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745 (codified as amended in scattered sections of 49 U.S.C.) 5, 6

Act of Mar. 4, 1915, Pub. L. No. 63-318, ch. 169, § 1, 38 Stat. 1192 (current version at 49 U.S.C. §§ 20701-20703 (2006)) 5

Boiler Inspection Act, 49 U.S.C. §§ 20701-20703 (2006) 2, 5

Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (2006) 13

Cited Authorities

Page

Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, title II, 84 Stat. 971 (1970) (codified as amended in scattered sections of 49 U.S.C.) 5

Locomotive Inspection Act ("LIA"), 49 U.S.C. § 20701-20703 (2006) ..... *passim*

Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 103-365, § 10, 106 Stat. 972 (1992) .. 7

OTHER AUTHORITIES

H.R. Rep. No. 110-259 (July 25, 2007) 6

H.R. Rep. No. 103-180 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818 6

H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104..... 5

L. Dixon and G. McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation*, in RAND Institute for Civil Justice (2001) 16

U.S. Dep't of Transp., Report to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996)..... 7

WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1983) 9

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

John Crane Inc. ("JCI") was founded in 1917 as Crane Packing Company. Throughout most of its history, JCI supplied packing and gaskets to customers in a number of industries, including the railroad industry. JCI supplied both packings and gaskets that contained asbestos in an encapsulated manner. Packing and gaskets are engineered mechanical seals that fill the space between two surfaces to prevent leakage. In railroad applications, packing was used to stop leaks on water and steam valves on locomotive engines, and gaskets were used on water pumps, air compressors and oil pumps on locomotives. After locomotives are built and the gaskets and packing are installed, they require periodic maintenance. JCI ceased supplying any asbestos-containing parts in 1985, more than 25 years ago.

JCI is a party to a Petition for a Writ of Certiorari currently pending before this Court, *John Crane Inc. v. Atwell*, No. 10-272 (*petition for cert. filed* Aug. 23, 2010), involving an almost identical issue. The question presented in *Atwell* is: "Whether, contrary to the ruling below, but in conformity with this Court's holding in *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926), and with an 'avalanche' of decisions from both federal and

---

1. Pursuant to Supreme Court Rule 37.6, counsel for amicus represents that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel nor any other person or entity other than amicus, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for amicus represents that all parties have consented to the filing of the brief. Letters reflecting their consent are on file with the Clerk.

state reviewing courts, the Boiler Inspection Act, 49 U.S.C. §§ 20701-20703 (2006), impliedly preempts the field of locomotive equipment, and thereby bars Respondent's state law claim?" JCI submits that the resolution of the instant case will impact its own pending case before this Court. JCI further desires to inform the Court of JCI's position that acceptance of Petitioner's arguments will disrupt the expectations of locomotive equipment manufacturers that have been settled for decades, and retroactively impose state law requirements on an increasingly small number of such solvent entities, decades after those entities have stopped supplying asbestos-containing products.

SUMMARY OF THE ARGUMENT

The preemption issue presented in this case is governed by this Court's 1926 decision in *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926). In *Napier*, this Court unanimously held that Congress intended, through its enactment of the Locomotive Inspection Act ("LIA"), 49 U.S.C. §20701-20703 (2006), and more specifically, its amendments, to preempt the entire field of locomotive equipment and safety, including "the design, the construction, and *the material of every part of the locomotive* and tender, and of all appurtenances." *Id.* at 611 (emphasis added). That decision resolved the precise issue here: whether manufacturers and designers of the parts and appurtenances of locomotives used on the interstate railroads may be subject to different standards prescribed by state tort laws, and may therefore be liable in damages under state law for failing to comply with those standards.

Napier was announced over 80 years ago, and the federal and state courts – with the exception of the

Pennsylvania state courts – have uniformly applied it during the intervening years. Congress has not addressed, much less corrected, this Court's conclusion in that case. This consistent application of the LIA in accordance with this Court's opinion in *Napier* has been relied upon by manufacturers of locomotive parts and equipment, including JCI. Overturning the Third Circuit's decision here would upset those settled expectations, and retroactively expose JCI to a series of potential common law-based tort claims premised on sales which it made more than 25 years ago. In overturning the settled expectations of manufacturers of asbestos-containing parts and materials, the retroactive obligations this Court would thrust on those manufacturers would be disproportionately borne by the few who remain in business. This Court should affirm the opinion below.

ARGUMENT

I. Respondent Correctly Identifies the Scope of Preemption and the Proper Application of the Preemption Doctrine in the Third Circuit's Opinion

JCI agrees with Respondent's position that *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926), governs the disposition of this case. In *Napier*, this Court resolved the precise issue here: whether manufacturers and designers of the parts and appurtenances of locomotives used on the interstate railroads may be subject to different standards prescribed by state tort laws, and may therefore be liable in damages under state law for failing to comply with those standards. As *Napier* held, and as the Third Circuit properly held here, the Locomotive Inspection Act ("LIA"), 49 U.S.C. §20701-20703 (2006), precludes that result. The Pennsylvania state courts remain the only

jurisdiction to have considered the question and come to the opposite conclusion. *Atwell v. John Crane, Inc.*, 986 A.2d 888 (Pa. Super Ct. 2009); *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980). The propriety of those cases remains pending before this Court in *John Crane Inc. v. Atwell*, No. 10-272 (*petition for cert. filed* Aug. 23, 2010).

II. Accepting Petitioner's Arguments Will Upset the Settled Expectations of Railroad Parts and Equipment Manufacturers and Result in the Unfair Imposition of Retroactive Liability on those Manufacturers

JCI has manufactured and sold packing and distributed gaskets since the 1930's. Until 1985, JCI sold packings and gaskets containing encapsulated asbestos to locomotive manufacturers. Packing and gaskets are engineered seals that fill the space between two surfaces to prevent leakage. Packing is primarily used to prevent leaks on water and steam valves on locomotive engines; gaskets are used in water pumps, air compressors and oil pumps on locomotives. These materials required periodic maintenance. Railroad workers removed used gaskets and packings from locomotive engines, and fabricated replacement parts in the railroad shops. The replacement gaskets and packing were then installed in locomotives.

The United States Congress, or by delegation, federal agencies, have exercised authority over the railroads, including the use of asbestos in the industry. Their authority originated from before the first transcontinental railroad was completed. *See Union v. Long Island R.R. Co.*, 455 U.S. 678, 687-88 (1982) (discussing history of

federal regulation of the railroads). In 1911, Congress passed the original version of the LIA. Act of Feb. 17, 1911, Pub. L. No. 61-383, ch. 103, § 2, 36 Stat. 913 (current version at 49 U.S.C. §§ 20701-20703 (2006)). The LIA was enacted for the purpose of protecting "employees and others by requiring the use of safe equipment." *Urie v. Thompson*, 337 U.S. 163, 182, at n. 20 (1949).

As originally enacted, the LIA applied only to the boiler of the locomotive and was known as the Boiler Inspection Act ("BIA"). In 1915, the Act was amended to cover "the entire locomotive and tender and all parts and appurtenances," Act of Mar. 4, 1915, Pub. L. No. 63-318, ch. 169, § 1, 38 Stat. 1192 (current version at 49 U.S.C. §§ 20701-20703 (2006)), and became known as the Locomotive Inspection Act. In 1970, Congress enacted the Federal Railroad Safety Act of 1970 ("FRSA"), Pub. L. No. 91-458, title II, 84 Stat. 971 (1970) (codified as amended in scattered sections of 49 U.S.C.), and then recodified the LIA, without substantive change, in 1994. Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745 (codified as amended in scattered sections of 49 U.S.C.). Congress passed one subsequent amendment to the FRSA in 2007, ("2007 FRSA Amendments"), 49 U.S.C.S. § 20106(b) (Lexis 2010).

In enacting the FRSA in 1970, Congress reaffirmed that under the LIA, and five other laws, "where the Federal Government has authority, with respect to rail safety, it preempts the field." H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4108. Congress further stated in 1970 that these laws "have served well" and therefore "chose to continue them without change." *Id.* at 4105. Moreover, in recodifying the BIA and other

transportation laws in 1994, Congress made clear that "[a]s in other codification bills enacting titles of the United States code into positive law, [the] bill makes no substantive change in the law," and expressly preserved "the precedent value of earlier judicial decisions," such as *Napier*. Act of July 5, 1994, Pub. L. No. 103-272 §§ 1(a), 6(a), 108 Stat. 745, 1378; H.R. Rep. No. 103-180, 3, 5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 820, 822.

The legislative history of the 2007 FRSA Amendments, relevant to the preemption provision, makes it clear that in passing the amendments, Congress intended to "adopt[] a provision that would clarify the intent and interpretations of the existing preemption statute and to rectify the Federal court decisions related to the Minot, North Dakota accident that are in conflict with precedent." H.R. Rep. No. 110-259, 351 (July 25, 2007). It provides further clarification of the intention of 49 U.S.C. § 20106 (2006), as it was enacted in the FRSA, to explain what State law causes of action for personal injury, death or property damage are not preempted. It clarifies that 49 U.S.C. § 20106 (2006) does not preempt state law causes of action where a party has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation or the Secretary of Homeland Security..." *Id.* It further states that "the modified language also contains a retroactivity provision, which clarifies that 49 U.S.C. § 20106 applies to all pending State law causes of action arising from activities or events occurring on or after January 18, 2002, the date of the Minot, North Dakota derailment." *Id.*

There is no specific Federal Railroad Administration ("FRA") regulation governing asbestos. In fact, the FRA

specifically investigated and addressed the question of asbestos in locomotive components, and concluded that the "FRA does not feel that further action with respect to the presence of asbestos in locomotive cabs is warranted at this time." *See* U.S. Dep't of Transp., Report to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996) ("1996 Report to Congress"). The Rail Safety Enforcement and Review Act of 1992 ("RSERA"), Pub. L. No. 103-365, §10, 106 Stat. 972 (1992), required the Secretary of Transportation to assess "the extent to which environmental...conditions in locomotive cabs affect...health," including consideration of "the effects on train crews of the presence of asbestos in locomotive components," and to "complete a rulemaking proceeding to consider prescribing regulations to improve the safety and working conditions of locomotive cabs." The RSERA required a "report to Congress on the reasons for that determination" if "the Secretary determines not to prescribe regulations." The FRA's 1996 Report to Congress, at 10-1, 10-12, 12-9, found that the "FRA has not identified sources of friable asbestos" on locomotives "to which crew members could be exposed," and that no asbestos regulations should be prescribed to improve the safety and working conditions of "locomotive cabs" because "the presence of asbestos" in older locomotives still on line posed no safety hazard "to humans or the environment." None of these actions by Congress or regulatory authorities questioned the propriety or application of *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926).

For the six decades between this Court's decision in *Napier* and JCI's decision to stop selling asbestos-containing gaskets and packing, the law was well-settled

that the LIA preempted the field of railroad equipment, such as gaskets and packings.[2] In *Napier*, this Court, interpreting the plain language of the statute, held that the LIA extends to "the design, the *construction*, and *the material of every part of the locomotive* and tender, and of all appurtenances." *Id.* at 611 (emphasis added). It is this language that is determinative of the preemptive scope of the LIA, and "there is no indication that Congress intended the [LIA]'s broad preemptive scope to be circumscribed by the location of the locomotive. Rather, the [preemptive scope of the LIA] is directed at the *subject* of the locomotive equipment, which is 'peculiarly one that calls for uniform law...'" *Frastaci v. Vapor Corp.*, 70 Cal. Rptr. 3d 402, 412 (Cal. Ct. App. 2007).

Ten years after *Napier*, in *Southern R. Co. v. Lunsford*, the Court promulgated a broad construction of "parts and appurtenances" as encompassing non-experimental equipment and parts that are, as a matter of fact, integrated into the locomotive. 297 U.S. 398, 401 (1936) (finding the absolute duty to keep "all parts and appurtenances" of locomotives in proper condition did not extend to safety devices which do not increase the peril and which are placed on locomotives by the carrier for experimental purposes). The state and federal courts that have considered the issue, including the Third Circuit in the underlying decision here, have concluded that asbestos-containing locomotive parts, such as those

---

2. Significant portions of the exposure of George Corson and Thomas Atwell occurred during this time, when *Napier's* application was unquestioned. Corson worked as a machinist repairing and maintaining locomotives from 1947 to 1974. (Petitioner's Brief, p. 10). Atwell worked briefly as an electrician, and then a pipe-fitter from 1951 until 2004.

manufactured and sold by JCI, come within the "parts and appurtenances" definition. *Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392 (3d Cir. 2010) (upholding district court's holding that the LIA preempted product liability tort claims, because the LIA occupied the field regulating locomotives and locomotive parts used in interstate commerce, and the brake pads and engine valves that allegedly caused asbestos exposure during installation were clearly locomotive equipment within the scope of the LIA); *Darby v. A-Best Prods. Co.*, 811 N.E.2d 1117, 1125-26 (Ohio 2004) (the LIA "preempts state-law tort claims against the manufacturers of railroad locomotives asserting injury caused by exposure to asbestos contained in railroad locomotives."); *Gen. Motors Corp. v. Kilgore*, 853 So.2d 171 (Ala. 2002) (LIA preempts claims against manufacturer for use of asbestos in locomotive parts).

Inclusion of gaskets and packing as a "part or appurtenance" also comports with the plain meaning of a "part" or "appurtenance." A "part," is defined as "one of the often indefinite or unequal subdivisions into which something is or is regarded as divided and which together constitute the whole." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, 855-86 (9th ed. 1983). An "appurtenance" is defined as "a subordinate part or adjunct." *Id.* at 98. The asbestos-containing gaskets and packing here were elements of, and integrated into, the locomotive engines, water pumps, air compressors and oil pumps. As such, they fit within *Lunsford*'s broad construction and the plain meaning of a "part or appurtenance." In other words, in the terms used by this Court in *Napier*, they were the "material" of railroad locomotive parts.

Furthermore, no limited reading of the "part or appurtenance" holding of *Napier* is allowed by the plain language of the LIA, which does not contain the phrase "in use," but *does* contain the phrase "allow to be used." "Allow to be used" contemplates the existence of an inspection and decision-making process concerning the safety of parts used in locomotives. Decisions about whether parts and material are "allowed to be used" are made when the locomotive is not "in use." Rather, such decisions are made as part of the "uniform national inspection and regulation scheme for locomotive equipment" that was created by the LIA. *United Transp. Union v. Foster*, 205 F.3d 851, 860 n. 16 (5th Cir. 2000).

There is "an overwhelming body of case law" following *Napier* that holds, without exception, that the LIA preempts common law and statutory claims against railroad operators and locomotive manufacturers related to the design, construction, or material of locomotives and their parts and appurtenances. *In re West Virginia Asbestos Litig.*, 592 S.E.2d 818, 822 (W. Va. 2003), *cert. denied sub nom. Abbott v. A-Best Prods. Co.*, 549 U.S. 823 (2006); *see, e.g., Darby v. A-Best Prods. Co.*, 811 N.E.2d 1117 (Ohio 2004) (LIA preempts state law tort claims against the manufacturers of railroad locomotives asserting injury caused by exposure to asbestos contained in railroad locomotives), *cert. denied*, 543 U.S. 1146 (2005); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171 (Ala. 2002) (LIA preempts claims against manufacturer for use of asbestos in locomotive parts); *Scheiding v. Gen. Motors Corp.*, 993 P.2d 996 (Cal. 2000) (LIA preempts state law defective design and failure-to-warn claims against manufacturer), *cert. denied*, 531 U.S. 958 (2000); *Wright v. Gen. Electric Co.*, 242 S.W.3d 674 (Ky. App. Ct. 2007) (LIA

preempts state common law tort claims against carriers, locomotive manufacturers, and locomotive component part manufacturers); *Frastaci v. Vapor Corp.*, 70 Cal. Rptr. 3d 402 (Cal. Ct. App. 2007) (LIA preempts state tort claims against locomotive manufacturers for defective design of their product); *Caradonna v. A.W. Chesterton Co., Inc.*, 2007 N.Y. Misc. LEXIS 8994 (N.Y. Slip Op. April 25, 2007) (LIA preempts claims of railroad worker, against various manufacturers of locomotives and their components and parts); *Seaman v. A.P. Green Indus.*, 707 N.Y.S.2d 299 (N.Y. Sup. Ct. 2000) (LIA preempts state tort claims against locomotive manufacturer); *Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205, 12010 (9th Cir. 2001) (LIA preempts non-employee product liability actions against manufacturer of locomotive cranes); *Law v. Gen. Motors Corp.*, 114 F.3d 908 (9th Cir. 1996) (LIA preempts design defect and failure to warn claims against manufacturer concerning engine insulation and brake noise); *First Sec. Bank v. Union Pac. R.R. Co.*, 152 F.3d 877 (8th Cir. 1998) (LIA preempts state common law remedies against railroad manufacturers for injuries arising out of alleged design defects); *Springston v. Consol. Rail Corp.*, 130 F.3d 241 (6th Cir. 1997) (LIA preempts claim based on inadequacy of warning devices), *cert. denied*, 523 U.S. 1094 (1998); *Oglesby v. Delaware & Hudson Ry.*, 180 F.3d 458 (2d Cir. 1999) (LIA preempts claim that manufacturer should have placed warning label on defective seat), *cert. denied sub nom. Oglesby v. Gen. Motors Corp.*, 528 U.S. 1004 (1999); *United Transp. Union v. Foster*, 205 F.3d 851 (5th Cir. 2000) (LIA preempts statute requiring engine be equipped with signal devices); *Mo. Pac. R.R. Co. v. R.R. Comm'n of Tex.*, 833 F.2d 570 (5th Cir. 1987) (LIA preempts state requirement for emergency equipment); *Roth v. I & M Rail Link LLC*,

179 F. Supp. 2d 1054 (S.D. Iowa 2001) (LIA preempts state law negligence claims against the manufacturer of a locomotive); *Norfolk S. Ry. Co. v. Denson*, 774 So. 2d 549 (Ala. 2000) (LIA preempts state law claim seeking to hold locomotive manufacturer liable for failure to install air conditioning); *Mickelson v. Mont. Rail Link, Inc.*, 999 P.2d 985 (Mont. 2000) (LIA preempts common law claims against railroad concerning locomotive equipment); *In re Train Collision at Gary, Ind.*, 670 N.E.2d 902 (Ind. App. Ct. 1996) (LIA preempts claims regarding alleged defects in the design and structure of train cars), *appeal denied sub nom. Dillon v. Chicago Southshore & South Bend R.R. Co.*, 683 N.E.2d 591 (Ind. 1997), *cert. denied sub nom. Dillon v. Northern Ind. Commuter Transp. Dist.*, 522 U.S. 914 (1997); *Stevenson v. Union Pac. R.R. Co.*, No. 4:07CV00522BSM, 2009 U.S. Dist. LEXIS 6148 (E.D. Ark. Jan. 20, 2009) (LIA preempts a contribution and indemnification claim because the underlying claim was preempted by the LIA); *Key v. Norfolk S. Ry. Co.*, 491 S.E.2d 511 (Ga. App. Ct. 1997) (LIA preempts common law claims against railroad by employee injured in fall from locomotive steps); *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Ala. On Sep. 22, 1993*, 188 F. Supp. 2d 1341 (S.D. Ala. 1999) (LIA preempts passenger and employee common law negligence and design defect claims against Amtrak).

The expectations of locomotive parts and equipment suppliers, including JCI, have remained well-settled in light of this "avalanche" of case law. It is for this reason that this Court does not so easily overturn its rulings: doing so "would ill serve the goals of 'stability' and 'predictability' that the doctrine of statutory *stare decisis* aims to ensure." *CSX Transp., Inc. v. McBride*, 131 S.

Ct. 2630, 2641 (2011). In *CSX Transp., Inc.*, a Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (2006), case concerning a railroad employee's negligence action, this Court reiterated that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation" and, that having repeated where an instruction was repeated "in subsequent opinions, and lower courts have employed it for over 50 years. To unsettle the law . . . would show scant respect for the principle of *stare decisis*." *Id.*, at 2636, 2639 n. 4 (2011), citing and quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). This Court's "precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error." *Citizens United v. FEC*, 130 S. Ct. 876, 911-912 (2010). Indeed, "[f]idelity to precedent – the policy of *stare decisis* – is vital to the proper exercise of the judicial function." *Id.* at 920 (Roberts, C.J., concurring) (internal quotation and citation omitted).

Petitioner puts forth no such "most convincing" reasons, and instead argues that the federal courts, and state courts aside from those in Pennsylvania, have overread *Napier*. (Pet. Brief, p. 14, 17, 36). This argument is incorrect. The courts following *Napier* have expressly rejected Petitioner's claims that the holding of *Napier* has been, or should be, limited. *See, e.g., In re West Virginia Asbestos Litig.*, 592 S.E.2d at 822; *Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205, 1210 (9th Cir. 2001) ("None of the Court's more recent preemption cases have questioned the authority of *Napier*, and, in any event, the rule is too well established to permit such a qualification by a lower court"); *Wright v. Gen. Electric Co.*, 242 S.W.3d 674, 679 (Ky. App. Ct. 2007) (rejecting plaintiffs' argument

that modern preemption jurisprudence has undermined the continuing viability of *Napier*); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171, 177-78 (Ala. 2002) (rejecting plaintiffs' claim that the field of the LIA's preemption has been narrowed by recent Supreme Court jurisprudence).

This Court addressed, and rejected, a similar argument as to a purported overreading of this Court's holdings in *CSX Transp., Inc.*, 131 S. Ct. 2630. There, the railroad employer appealed the decisions of the Seventh Circuit Court of Appeals, which upheld a jury instruction concerning proximate cause. *Id.* 2632. That instruction was a recitation of this Court's enunciation of the "any part . . . in producing the injury" proximate cause test to be applied in FELA negligence actions, first described in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). *CSX Transp., Inc.*, 131 S. Ct. at 2636, 2638, 2640. CSX argued that the lower courts had overread *Rogers*, which, it argued, was a narrowly focused, fact-based, decision that did not displace common-law formulations of proximate cause. *Id.* at 2636-67.

The Court rejected that line of reasoning, stating that *Rogers* was "most sensibly read as a comprehensive statement of the FELA causation standard," *id.* at 2638, and that subsequent decisions "confirmed that Rogers announced a general standard for causation in FELA cases." *Id.* at 2639. The Court also considered that *Rogers* was "accepted as settled law for several decades," that Congress had had more than 50 years to correct the decision, but had not, and "[c]ountless judges have instructed countless juries in language drawn from *Rogers*. To discard or restrict the *Rogers* instruction now would ill serve the goals of 'stability' and 'predictability'

that the doctrine of statutory *stare decisis* aims to ensure." *Id.* at 2641.

No different outcome is warranted here. *Napier* was announced over 80 years ago, and the federal and state courts – with the exception of the Pennsylvania state courts – have uniformly applied it during the intervening years. Congress has not addressed, much less corrected, this Court's conclusion in that case. Prior to JCI's cessation of the distribution of asbestos-containing gaskets and packings to the railroad industry in 1985, JCI had every reason to believe the LIA applied to those sales. Overturning the Third Circuit's decision here would upset those settled expectations, and retroactively expose JCI to a series of potential common law-based tort claims premised on sales which it made more than 25 years ago.

"Retroactivity is generally disfavored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In other contexts, this Court has rejected measures that would invite such results, where the "distance into the past" reached to impose liability is great. *See, e.g., Eastern Enters. v. Apfel*, 524 U.S. 498, 534 (1998). Retroactive imposition of state law liability is particularly unsuitable in the field of asbestos liability, as the remaining number of solvent companies will be forced to defend against and ultimately bear the burden of the retroactive state court liability sought to be imposed by Petitioner here. As this Court is aware, in the intervening decades, many manufacturers and suppliers of asbestos-containing equipment and parts have gone bankrupt. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 632 (1997) (J. Breyer, dissenting) (noting general problems in asbestos-related liability cases, including increasing numbers

of bankruptcies); L. Dixon and G. McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation*, in RAND INSTITUTE FOR CIVIL JUSTICE (2001), p. 2 (as of March, 2011, 96 companies with asbestos liabilities had filed for reorganization and 56 trusts had been established).

There is no compelling reason here to overturn *Napier*, thereby inviting that result. To the contrary, the parties' positions compel the opposite result. In overturning the settled expectations of manufacturers of asbestos-containing parts and materials, the retroactive obligations this Court would thrust on those manufacturers would be disproportionately borne by the few who remain in business. Courts recognize that retroactivity "may undermine rule-of-law values that enable people to know what the law is, and to have confidence about the legal consequences of their actions." *City of New York v. Permanent Mission of India*, 618 F.3d 172, 195 (2d Cir. 2010) (dismissing plaintiff's lawsuit seeking to tax properties owned by governments of India and Mongolia and discussing retroactive application of Vienna Convention on Consular Relations and related rules). That is precisely what would result from overturning the Third Circuit's decision here.

CONCLUSION

For the foregoing reasons, JCI respectfully requests that the Court affirm the decision of the court below.

Respectfully submitted,

WILLIAM SMITH
WILLIAM R. ADAMS
DICKIE, MCCAMEY
& CHILCOTE
Public Ledger Building,
Suite 901
150 South Independence
Mall, West
Philadelphia, PA 19106-3409

DANIEL J. O'CONNELL
MARK I. TIVIN
THOMAS J. BURNS
DANIEL R. GRIFFIN
O'CONNELL, TIVIN,
MILLER & BURNS
135 S. LaSalle Street,
Suite 2300
Chicago, IL 60603

MICHAEL A. POLLARD
Counsel of Record
KATHLEEN T. SANDERSON
LINDSAY A. PHILIBEN
BAKER & MCKENZIE LLP
One Prudential Plaza
130 East Randolph Drive
Chicago, IL 60601
(312) 861-2786
Michael.Pollard@
bakermckenzie.com

Attorneys for Amicus Curiae

AMICUS CURIAE BRIEF

OCT 11 2011

No. 10-879

IN THE SUPREME COURT OF THE UNITED STATES

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. CORSON, WIDOW IN HER OWN RIGHT,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENTS

Quentin Riegel
National Association
of Manufacturers
1331 Pennsylvania
Avenue, NW
Washington, D.C. 20004
(202) 637-3000

Mark A. Behrens
Counsel of Record
Cary Silverman
SHOOK, HARDY
& BACON L.L.P.
1155 F Street, N.W.
Suite 200
Washington, D.C. 20004
(202) 783-8400

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. OVERVIEW OF ASBESTOS LITIGATION TODAY: PLACING THIS CASE IN CONTEXT 4

II. THIS CASE IS ANOTHER ATTEMPT TO EXTEND AND EXPAND FOUR DECADES OF ASBESTOS LITIGATION 7

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

CASES

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 2

Arizona v. Rumsey, 467 U.S. 203 (1984) 7-8

Bates v. Dow Agrosciences LLC,
544 U.S. 431 (2005) 12

BMW of N. Am., Inc. v. Gore,
701 So. 2d 507 (Ala. 1997) 15

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 12

CSX Transp. v. McBride,
131 S. Ct. 2630 (2011) 5

Flagg v. Yonkers Sav. & Loan Ass'n, 396 F.3d
178 (2d Cir. 2005), *aff'd*, 550 U.S. 1 (2007) 7

Geier v. American Honda Motor Co.,
529 U.S. 861 (2000) 3, 9, 10-11

In re Combustion Eng'g, Inc.,
391 F.3d 190 (3d Cir. 2005) 2

In re W. Va. Asbestos Litig.,
592 S.E.2d 818 (W. Va. 2002) 3, 8

Napier v. Atlantic Coast Line R.R. Co.,
272 U.S. 605 (1926) 3, 5, 7

PLIVA v. Mensing, 131 S. Ct. 2567 (2011) 9, 11

Randall v. Sorrell, 548 U.S. 230 (2006) 7-8

Riegel v. Medtronic, Inc.,
552 U.S. 312 (2008) ..... *passim*

*Silvas v. E*Trade Mortgage Corp.*,
514 F.3d 1001 (9th Cir. 2008) 7

Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.,537 U.S. 51 (2002) 13

United States v. Weintraub,
273 F.3d 139 (2d Cir. 2001) 2

Wachovia Bank, N.A. v. Watters,
431 F.3d 556 (6th Cir. 2005) 7

Williams v. Florida, 399 U.S. 78, 86 (1970) 16

Williamson v. Mazda Motor of Am., Inc.,
131 S. Ct. 1131 (2011) 9, 11

Wyeth v. Levine, 555 U.S. 555 (2009) 9

STATUTES AND REGULATIONS

21 U.S.C. § 360k 12

45 U.S.C. § 51 et seq. 5

46 U.S.C. § 4306 13

46 U.S.C. § 4311 13

49 U.S.C. § 20701 8

OTHER AUTHORITIES

American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* (Aug. 2007), *available at* http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf 5

Charles E. Bates et al., *The Naming Game*, 24:15 Mealey's Litig. Rep.: Asbestos 1 (Sept. 2, 2009), *available at* http://www.bateswhite.com/media/pnc/9/media.229.pdf 6

Charles E. Bates et al, *The Claiming Game*, 25:1 Mealey's Litig. Rep.: Asbestos 27 (Feb. 3, 2010), *available at* http://www.bateswhite.com/media/pnc/2/media.2.pdf 6

Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 Mealey's Asbestos Bankr. Rep. 1 (Nov. 2006), *available at* http://www.bateswhite.com/media/pnc/7/media.287.pdf 6

Mark Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501 (2009) 2

Stephen Carroll et al., *Asbestos Litigation* 94 (Rand Corp. 2005), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf 5

Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (Rand Corp. 2010), *available at* http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf 4, 6

Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* xi (Rand Corp. 2011), *available at* http://www.rand.org/pubs/monographs/MG1104.html 6

Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract available at* 2001 WLNR 1993314 4

Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511 (2008) 2

'Medical Monitoring and Asbestos Litigation'— A Discussion with Richard Scruggs and Victor Schwartz, 17:3 Mealey's Litig. Rep: Asbestos 5 (Mar. 1, 2002) 4

Joseph Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003) 4

Towers Watson, *A Synthesis of Asbestos Disclosures From Form 10-Ks - Insights*, Apr. 2010, at 1, *available at* http://www.towerswatson.com/assets/pdf/1492/Asbestos_Disclosures_Insights_4-15-10.pdf 5

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping an environment conducive to economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards. This appeal has the potential to permit product liability lawsuits long considered preempted by federal law; such an outcome would be detrimental to the NAM's members.

STATEMENT OF THE CASE

The NAM adopts Respondents' Statement of the Case.

---

[1] Pursuant to Rule 37.3(a), counsel represents that all parties have consented to the filing of this brief. Letters reflecting the parties' consent have been lodged with the Court. Per Rule 37.6, no counsel for a party has authored this brief in whole or in part; no person or entity, other than the *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Petitioners seek a change in the law that would allow them to pursue asbestos personal injury claims against locomotive equipment manufacturers and distributors not previously amenable to suit, further widening the net of asbestos litigation that has burdened the nation's courts, ensnarled more than 10,000 companies, and forced almost 100 employers into bankruptcy. Petitioners ask the Court to draw a distinction between preemption of state statutes and regulations and state common law claims that is inconsistent with precedent, artificial, litigation-generating, and could potentially expand liability in other contexts.

Asbestos litigation is the "longest-running mass tort" in U.S. history. Helen Freedman, *Selected Ethical Issues in Asbestos Litigation,* 37 Sw. U. L. Rev. 511, 511 (2008). "For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (describing the asbestos litigation as a "crisis."); *United States v. Weintraub*, 273 F.3d 139, 150 (2d Cir. 2001) ("High profile awards, settlements, and bankruptcies have resulted from the filing of thousands of lawsuits by sufferers of asbestos-related ailments."). Now in its fourth decade, the litigation has been sustained by a relentless search for new defendants and new theories of liability. *See* Mark Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501 (2009). This case represents another instance of a creative

attempt to expand the types of defendants subject to suit.

Here, Petitioners seek to expand asbestos litigation to locomotive equipment manufacturers and distributors despite nearly a century of precedent, *see Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926), and an "avalanche of authority," *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818, 822 (W. Va. 2002), holding that such claims are preempted. Petitioners, joined by several *amici*, suggest that this Court should distinguish between state statutes and regulations, as subject to preemption, and state tort law claims, which they claim are preserved (Pet. Br. at 36-40). Such a distinction would not only impact Respondents, but significantly alter this Court's preemption jurisprudence. Should the Court follow plaintiffs' invitation, manufacturers of other federally-regulated products could face significant new liability and regulatory complexity.

Absent express federal statutory language to the contrary, this Court has properly treated state "positive" law and tort law as equivalent for preemption purposes. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008). Both effectively impose legal requirements. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 871 (2000). In fact, numerous individual tort claims, varying in their theories, have the potential to result in far greater complexity, inconsistency, and conflict than statutes or regulations. *See id.* Common law claims must be subject to ordinary principles of preemption.

ARGUMENT

I. OVERVIEW OF ASBESTOS LITIGATION TODAY: PLACING THIS CASE IN CONTEXT

In its earlier years, the asbestos litigation focused on companies that manufactured asbestos-containing products, often called "traditional defendants," such as Johns Manville. Most of these primary historical manufacturers of asbestos are now bankrupt. Asbestos litigation has now forced at least ninety-six companies into bankruptcy, *see* Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (Rand Corp. 2010), *available at* http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf, with devastating impacts on defendants companies' employees, retirees, shareholders, and surrounding communities. *See* Joseph Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003).

As a result of the large number of bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract available at* 2001 WLNR 1993314. One former plaintiffs' attorney described the litigation as an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).

The Towers Watson consulting firm has identified more than 10,000 companies, including subsidiaries, named as asbestos defendants. *See* Towers Watson, *A Synthesis of Asbestos Disclosures From Form 10-Ks - Insights*, Apr. 2010, at 1, *at* http://www.towerswatson.com/assets/pdf/1492/Asbestos_Disclosures_Insights_4-15-10.pdf. At least one company in nearly every U.S. industry is involved in the litigation. *See* American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* 5 (Aug. 2007), *available at* http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf. Nontraditional defendants now account for more than half of asbestos expenditures. *See* Stephen Carroll et al., *Asbestos Litigation* 94 (Rand Corp. 2005), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf. The case before this Court exemplifies this trend because Petitioners seek to impose liability on an industry not previously considered subject to suit.

The change that Petitioners seek has the potential to alter a settled legal landscape and expose Respondents and like companies to substantial liability and unpredictability, undermining the goals of uniformity in the Locomotive Inspection Act as discussed in *Napier*, 272 U.S. at 210.

Adherence longstanding precedent will not leave railroad workers without an avenue for recovery. First, railroad workers such as Petitioner have a right to seek compensation from their employers under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq. FELA provides a

featherweight standard for causation. *See CSX Transp. v. McBride*, 131 S. Ct. 2630, 2640 (2011). Second, like all asbestos claimants, Petitioner also may be able to obtain recoveries from trusts created to pay claims relating to the scores of companies that have declared bankruptcy as a result of asbestos liabilities. Over sixty trusts have been established or proposed to collectively form a $30-plus billion privately funded asbestos personal injury compensation system that operates parallel to, but wholly independent of, the civil tort system. *See* Lloyd Dixon et al., *An Overview of Trust Structure and Activity*, *supra*, at 25. "Trust outlays have grown rapidly since 2005." Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* xi (Rand Corp. 2011), *at* http://www.rand.org/pubs/monographs/MG1104.html. "For the first time ever, trust recoveries may fully compensate asbestos victims." Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 Mealey's Asbestos Bankr. Rep. 1 (Nov. 2006), *available at* http://www.bateswhite.com/media/pnc/7/media.287.pdf.[2]

---

[2] For example, it is estimated that mesothelioma plaintiffs in Alameda County (Oakland) will receive an average $1.2 million from active and emerging asbestos bankruptcy trusts, *see* Charles E. Bates et al., *The Naming Game*, 24:15 Mealey's Litig. Rep.: Asbestos 1 (Sept. 2, 2009), *available at* http://www.bateswhite.com/media/pnc/9/media.229.pdf, and could receive as much as $1.6 million. *See* Charles E. Bates et al, *The Claiming Game*, 25:1 Mealey's Litig. Rep.: Asbestos 27 (Feb. 3, 2010), *available at* http://www.bateswhite.com/media/pnc/2/media.2.pdf.

II. THIS CASE IS ANOTHER ATTEMPT TO EXTEND AND EXPAND FOUR DECADES OF ASBESTOS LITIGATION

It is in the context of this long history of plaintiffs seeking out new solvent defendants to compensate asbestos claimants that Petitioners ask this Court to abandon nearly a century of precedent, *see Napier*, 272 U.S. 605, and permit tort claims that would impose state requirements on locomotive equipment manufacturers and distributors[3] Such a ruling also could potentially impact a myriad of other contexts where federal regulations may collide with state common law theories.

As this Court has recognized, *stare decisis* "demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires 'special justification.' This is especially true where, as here, the principle has become settled through iteration and reiteration over a long period of time." *Randall v. Sorrell*, 548 U.S. 230, 244 (2006)

---

[3] Given the longstanding federal regulation of railroads and locomotive equipment, any presumption against preemption "disappears . . . in fields of regulation that have been substantially occupied by federal authority for an extended period of time." *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, 560 n.3 (6th Cir. 2005) (quoting *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005), *aff'd*, 550 U.S. 1 (2007); *see also Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1005, 1008 (9th Cir. 2008) (finding that "[b]ecause there has been a history of significant federal presence in national banking, the presumption against preemption of state law is inapplicable" and holding that federal regulation preempted the field of lending regulation for federal savings associations, including class action lawsuit).

(internal citation omitted) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). To overcome "an avalanche of authority," *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 822, finding that Congress intended to preempt the field of safety regulation of "the entire locomotive and tender and all parts and appurtenances thereto," 49 U.S.C. § 20701, Petitioners present at least three theories to distinguish their case from *Napier*: (1) preemption applies only when a locomotive is "in use," but not when it is stationary for repairs; (2) subsequent enactments indicate that Congress has altered its longstanding intent to preempt the field of locomotive safety; and (3) preemption is limited to state "positive" law (i.e., statutes and regulations), but does not reach state tort law claims.

These assertions lack merit, as demonstrated by the Respondents and other allied *amici*. This brief focuses on the third of the Petitioners' suggestions for limiting the preemptive effect of the Locomotive Inspection Act (LIA) – namely, the broad implications for liability beyond locomotive equipment manufacturers and distributors.

In making their argument that preemption does not extend to state tort law claims (Pet. Br. at 36-40), Petitioners are joined by several *amici* that clearly seek from this Court a ruling that limits traditional principles of preemption to statutes and regulations, while preserving state common law claims. *See, e.g.*, *Amicus Curiae* Br. of the Am. Ass'n for Justice, at 1-2 ("The crucial issue in this case is whether federal preemption of the field of state legislative and administrative regulation necessarily or impliedly

extends to preemption of common-law tort remedies. . . ."); Br. of *Amicus Curiae* Public Justice, P.C. at 1 ("Public Justice files this brief . . . to expand on the argument . . . that while pervasive federal regulation of a field may preempt positive state law, it cannot serve as a basis for depriving tort victims of their state common-law remedies . . . ."); *see also* Br. of Public Law Scholars as *Amici Curiae* at 21-25. These assertions are not supported by this Court's jurisprudence, which treats common law duties as equivalent to state statutes and regulations for preemption purposes.

Preemption law has indeed evolved since Congress enacted the LIA, but not in the respect for which Petitioners and their supporting *amici* urge this Court's reexamination of *Napier*. In numerous cases, this Court has considered the scope of preemption, including several cases in recent years involving the design of medical devices, warnings related to brand-name and generic prescription drugs, and automobile design. *See PLIVA v. Mensing*, 131 S. Ct. 2567 (2011); *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

In its recent rulings, the Court reached various outcomes on the preemptive effect based on the language of the statute, other indications of Congressional intent, and the facts of the case before it. A consistent aspect of these decisions and the Court's earlier jurisprudence is that, absent statutory language to the contrary, the Court has not

distinguished between state statutes and regulations, and state common law tort claims. The Court has applied principles of preemption equally to all state law.

For example, the Court closely considered preemption of tort law claims in *Geier*, where the Court found that a Federal Motor Vehicle Safety Standard (FMVSS) that gave manufacturers the option of installing airbags in vehicles, but did not require that they do so, precluded tort lawsuits that would have taken away the choice, provided by federal regulators, to either install an airbag or another passive restraint system. 529 U.S. at 865. In that case, the federal statute at issue included both an express preemption provision and a savings clause preserving certain state tort law claims. *Id.* at 869. Nevertheless, the Court found that "operation of ordinary pre-emption principles" precluded tort suits that posed an obstacle to the accomplishment of the objectives of the FMVSS at issue. *See id.* at 871-72.

The Court recognized that Congress's preemption of "all state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create." *Id.* at 871. Tort suits, the Court found, must be included within the realm of preemption because they have the same effect in creating inconsistent or undesirable regulatory obligations as state "positive" law. As the Court reasoned, "rules of law that judges and juries create or apply in such suits may themselves

similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts." *Id.* The Court saw no reason why a "jury-imposed safety standard" should be treated differently than a safety standard promulgated by a state regulatory agency or enacted by a state legislature. *See id.* Thus, the Court concluded that federal law preempted a "common-law 'no airbag' action" that set a conflicting standard. *See id.* at 874; *see also Williamson,* 131 S. Ct. at 1136 (reaffirming that a federal standard may preempt state tort law, while finding that the particular tort claim at issue did not stand as an obstacle to an important federal regulatory objective).

Most recently, in *PLIVA*, the Court again applied preemption to state tort law duties that conflicted with federal regulatory requirements, and did not reserve preemption for state "positive" law. In that case, the Court found that "[s]tate tort law places a duty directly on all drug manufacturers to adequately and safely label their products," while federal regulations required manufacturers of generic drugs to use the exact same label as the branded counterpart. 131 S. Ct. at 2557. Since federal law did not permit generic manufacturers to adopt stronger warnings than those approved for the branded drug, the Court found tort claims seeking to impose such an obligation impermissible. *See id.* at 2577-78. Certainly, this Court would not treat a state statute or regulation requiring generic drug manufacturers to supplement warnings any differently.

The same principle of equivalence holds true with express preemption. For instance, in *Riegel*, this Court considered whether a provision in the Medical Device Act that expressly preempts state requirements "different from, or in addition to, any requirement applicable . . . to the device" applies to state common law claims related to the safety and effectiveness of the device. 552 U.S. at 335 (quoting 21 U.S.C. § 360k(a)). The Court concluded that it did. In finding preemption, the Court noted two other instances in which it had held that provisions pre-empting state "requirements" preempted common-law duties. *Id.* at 324 (citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 433 (2005) (holding that a provision of Federal Insecticide, Fungicide, and Rodenticide Act preempted common-law actions because they imposed state law requirements for labeling or packaging in addition to or different from those required under federal law) and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992) (plurality opinion) and *id.* at 548-49 (Scalia, J., concurring in judgment in part and dissenting in part) (holding that a provision of the Public Health Cigarette Smoking Act of 1969 preempted common law actions because they would impose state law requirements or prohibitions based on smoking and health with respect to the advertising or promotion of any cigarettes whose packages were labeled in accordance with federal law)).

As this Court clearly recognized in *Riegel*, and is directly applicable in the case at bar, "[a]bsent other indication, reference to a State's 'requirements'

includes its common-law duties." 552 U.S. at 324.[4] The Court's reasoning in finding that "excluding common-law duties from the scope of pre-emption would make little sense" is particularly instructive here. *Id.* at 324-25. As the Court understood:

> State tort law that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme no less than state regulatory law to the same effect. Indeed, one would think that tort law, applied by juries under a negligence or strict-liability standard, is less deserving of preservation. A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its

---

[4] *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51 (2002), provides an example of where *Congress* distinguished between state statutes and regulations and common law. In that instance, the Federal Boat Safety Act (FBSA), expressly stated that "a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard, 46 U.S.C. § 4306, while preserving "liability at common law, *id.* § 4311(g). This statutory text was the foundation of this Court's language, relied upon by Petitioners (Pet. at 38-39) to support their view that common law should be treated differently that statutes and regulations for field preemption purposes. *See Sprietsma*, 537 U.S. at 69 ("The FBSA might be interpreted as expressly occupying the field with respect to state positive laws and regulations but *its structure and framework* do not convey a 'clear and manifest' intent . . . to go even further and implicitly pre-empt all state common law relating to boat manufacture. Rather, our conclusion that *the Act's express pre-emption clause does not cover common-law claims* suggests the opposite intent." (internal citations omitted) (emphasis added)).

> greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court. As Justice BREYER explained in *Lohr*, it is implausible that the MDA was meant to "grant greater power (to set state standards 'different from, or in addition to' federal standards) to a single state jury than to state officials acting through state administrative or legislative lawmaking processes."

Id. at 325. The Court concluded that it would "not turn somersaults" to create a "perverse distinction" between state statutory and common law in considering the scope of preemption unless required to do so by Congress. *Id.*

In the context of field preemption, and the LIA specifically, there is likewise no reason to give state tort law claims greater insulation from the intent of Congress to provide a uniform federal regulatory system than state statutes or regulation. As these cases recognize, there are several reasons warranting treatment of common law claims in the same manner as state statutes and regulations for purposes of federal preemption.

First, tort law claims seek to impose regulatory requirements (through the threat of liability) that have the same effect as a state statute. While the primary goal of tort law is to compensate an injured party, in product liability suits, it does so through imposing a state law duty on a manufacturer to alter the design or warnings of a product that allegedly

caused the harm. In fact, product liability lawsuits may impose exponentially harsher consequences for noncompliance than the maximum penalty authorized by statutes or regulations. *See, e.g., BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507 (Ala. 1997) (on remand from this Court, requiring remittitur of punitive damage award from $4 million to $50,000, in addition to compensatory damages of $4,000, when maximum statutory penalty was $2,000).

Second, the benefits of uniformity are not equal, but greater, with respect to preemption of tort claims than with respect to state "positive law." While state statutes and rules have the potential to subject manufacturers to fifty-one different standards with respect to the design or labeling of products, there is no limit to the number of regulatory obligations that individual state lawsuits may impose. State tort claims may subject already-regulated parties different, inconsistent, conflicting, or burdensome obligations in every case. Field preemption provides clarity by subjecting parties in an area of particular federal concern to a single set of requirements.

Finally, as the Court observed in *Riegel*, it would seem that common law claims deserve less protection than state statutes in a preemption analysis. *See* 552 U.S. at 325. Principles of federalism seek to preserve the power of state governments vis-à-vis the federal government. With respect to common law claims, however, the state standard that is in tension with federal law did not result from an official act of the legislature or a regulatory body acting pursuant to statutory authority, but originated from a lawsuit

between two private parties. Common law standards are not the product of deliberation by state officials, but a civil jury composed of as little as six individuals. *See Williams v. Florida*, 399 U.S. 78, 86 (1970) (permitting a state jury of six members and finding that "the 12-man panel is not a necessary ingredient of 'trial by jury'"). Nevertheless, tort lawsuits have the potential to create complexity, inconsistency, and conflict to an even greater extent than state "positive" law. For that reason, it is particularly important to subject common law claims to ordinary principles of preemption.

CONCLUSION

For the foregoing reasons, the NAM respectfully requests that this Court affirm the court below.

Respectfully submitted,

Mark A. Behrens
Counsel of Record
Cary Silverman
SHOOK, HARDY & BACON L.L.P.
1155 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 783-8400

Attorneys for Amicus Curiae

Quentin Riegel
National Association
of Manufacturers
1331 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 637-3000

Of Counsel

Dated: October 7, 2011

AMICUS CURIAE BRIEF

RECORD
FILED
AUG 19 2011

No. 10-879

IN THE
Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, WIDOW IN HER OWN RIGHT,
Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF RETIRED AND VETERAN RAILWAY EMPLOYEES IN SUPPORT OF PETITIONERS

WILLARD J. MOODY, JR.
THE MOODY LAW FIRM, INC.
500 Crawford Street
Suite 300
Portsmouth, Virginia
23705
(757) 393-6020

MARC C. GRECO
Counsel of Record
RICHARD S. GLASSER
KIP A. HARBISON
GLASSER AND GLASSER, P.L.C.
Crown Center, Suite 600
580 E. Main Street
Norfolk, Virginia 23510
(757) 625-6787
(marcg@glasserlaw.com)

August 19, 2011

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

INTRODUCTION 1

STATEMENT 2

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. THE LOCOMOTIVE INSPECTION ACT WAS REPEALED, AND THE FEW RECODIFIED PROVISIONS CANNOT PROVIDE THE BASIS FOR PREEMPTION 9

II. LEGISLATIVE HISTORY OF THE FRSA, FOUND IN THE SENATE REPORT AND HOUSE REPORT, REVEALS CONGRESS'S INTENT TO REPLACE FIELD PREEMPTION ATTRIBUTED TO THE LIA IN THE PAST AND PRESERVE STATE LAW 14

III. THE FRSA EXPRESSLY AUTHORIZES PETITIONERS' COMMON LAW CLAIMS FOR INJURY 17

A. The FRSA Preemption Provision Establishes A Presumption Of State Authority With Regard To Railroad Safety, And Exceptions To State

Authority Are Not Satisfied So As To Preempt Petitioners' Claims 17

B. The Preamble To The Preemption Provision And The Provision's Requirements For State Laws That Are More Stringent Than Federal Standards Do Not Affect Petitioners' State Law Claims 20

IV. THE FRSA PREEMPTION PROVISION IS APPLICABLE TO PETITIONERS' CLAIMS, AS CONFIRMED BY ITS LOCATION IN THE FEDERAL CODE AND THIS COURT'S INTERPRETATION OF THE PROVISION 21

A. Given Their Relative Locations Within The Federal Code, The FRSA Preemption Provision Governs Preemption For The LIA Provisions 21

B. This Court Has Already Given The FRSA Preemption Provision Broad Application To All Matters Of Railroad Safety In *CSX Transp., Inc. v. Easterwood* And Found That The Provision Grants Deference To State Law 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Altria Group, Inc. v. Good, 555 U.S. 70 (2008) 21

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 25, 26

City of Akron v. Akron Center for Reproductive Rights, 462 U.S. 416 (1983) 28

Consol. Rail Corp. v. Pennsylvania Pub. Util. Comm'n, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem. sub nom.*, 461 U.S. 912 (1983) .. 27, 28

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) 7, 8, 18, 24, 25, 26, 28, 29

Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176 (1980) 9

Eckert v. Aliquippa & Southern R.R. Co., 828 F.2d 183 (3d Cir.1987) 11, 23

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) 19

Law v. Gen. Motors Corp., 114 F.3d 908 (9th Cir. 1997) 26

Lundeen v. Canadian Pac. Ry. Co., 447 F.3d 606 (8th Cir. 2006) (*Lundeen I*) 5, 6

Lundeen v. Canadian Pac. Ry. Co., 532 F.3d 682 (8th Cir. 2008) (*Lundeen II*) 5, 6

Marshall v. Burlington N., Inc., 720 F.2d 1149 (9th Cir. 1983) 26, 27

Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605 (1926) 7, 9, 13, 14

Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000) 24

Oglesby v. Delaware & Hudson Ry. Co., 180 F.3d 458 (2d Cir. 1999) 26

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 19

Springston v. Consol. Rail Corp., 130 F.3d 241 (6th Cir. 1997) 26

Urie v. Thompson, 337 U.S. 163 (1949) 18

United States v. Baltimore & O. R.R. Co., 293 U.S. 454 (1935) 2, 3, 7, 9, 10

STATUTES

Act of Feb. 17, 1911, ch. 103, 36 Stat. 913 (Boiler Inspection Act) ..... *passim*

§ 5, 36 Stat. 914-915 ..... 2, 3, 5, 7, 9, 10, 12, 13, 23, 26

§ 6, 36 Stat. 915-916 9

45 U.S.C. §§ 22-34 2

45 U.S.C. § 22 5

45 U.S.C. §§ 24-27 5

45 U.S.C. § 28 ..... 2, 5, 9, 10, 11, 12

45 U.S.C. § 29 9

45 U.S.C. § 31 5

45 U.S.C. § 34 5

49 U.S.C. §§ 20701-20703 ..... 5, 13

49 U.S.C. § 20702(d) 12

Act of Mar. 4, 1915, ch. 169, § 1, 38 Stat. 1192 2

Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745 ..... 3, 4, 5, 11, 12, 22

Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* 11

45 U.S.C. § 54a 11

Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971 ..... *passim*

45 U.S.C. § 421, *et seq.* 3

45 U.S.C. § 431 ..... 11, 13

45 U.S.C. § 434 ..... 4, 21, 24, 25

45 U.S.C. § 437(c) 11

49 U.S.C. §§ 20101-28505 22

49 U.S.C. § 20101 ..... 7, 8, 11

49 U.S.C. § 20102 22

49 U.S.C. § 20103 ..... 20, 22, 23

49 U.S.C. § 20103(a) 4, 7, 8, 11, 12, 13, 17

49 U.S.C. § 20105 ..... 22, 23

49 U.S.C. § 20105(a) 23

49 U.S.C. § 20105(d) 23

49 U.S.C. § 20106 ..... 6, 21, 22, 23, 26

49 U.S.C. § 20106(a)(1) 20

49 U.S.C. § 20106(a)(2) 1, 4, 5, 6,8,17,18, 19 20, 23, 24, 26, 27, 28

49 U.S.C. § 20106(a)(2)(A)-(C) 21

49 U.S.C. § 20106(b) 5, 6

49 U.S.C. § 20106(c) 5

49 U.S.C. § 20107 22

Subtitle V, Part A, Ch. 201 ..... 22, 23

Subtitle V, Part A, Ch. 203 22

Subtitle V, Part A, Ch. 205 22

Subtitle V, Part A, Ch. 207 ..... 22, 23

Subtitle V, Part A, Ch. 209 22

Subtitle V, Part A, Ch. 211 22

Subtitle V, Part A, Ch. 213 22

LEGISLATIVE MATERIALS

H. Rep. No. 91-1194 (1970) 14, 15, 16

S. Rep. No. 91-619 (1969) 12, 14, 15

S. Rep. No. 103-265 (1994) 5, 12

ADMINISTRATIVE MATERIALS

49 C.F.R. Pts. 200-268 29

49 C.F.R. § 224.5 23

49 C.F.R. § 230.231(a) 27

49 C.F.R. § 230.234 27

30 Fed. Reg. 9351, 79 Stat. 1320 5

Thirtieth Annual Report of the Interstate Commerce Commission, December 1, 1916..... 10

INTEREST OF THE AMICUS CURIAE[1]

The National Association of Retired and Veteran Railway Employees ("NARVRE") is an organization of over 20,000 former railroad workers. Its members were exposed to asbestos products while employed as railroad workers. Many have contracted asbestos disease, and others are at risk of developing asbestos disease. Their right to compensation from the manufactures of asbestos products will be affected by the outcome of this appeal.

INTRODUCTION

NARVRE agrees with Petitioners that the Third Circuit was in error when it found that the Locomotive Inspection Act preempted a field that was broader than the field that the act regulated. NARVRE argues further that the Third Circuit was in error when it found that a state could not adopt a law or order regarding railroad safety, notwithstanding Congress's express authorization to states to "adopt or continue in force a law, regulation, or order related to railroad safety" until the specific subject matter of the state law is covered by federal regulation. 49 U.S.C. § 20106(a)(2). Because federal regulation does not cover asbestos hazards on locomotives or the warnings

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus represents that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than amicus, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for amicus represents that all parties have consented to the filing of this brief. Letters reflecting their consent are on file with the Clerk.

necessitated by such hazards, Petitioners' claims are authorized by Congress.

STATEMENT

NARVRE adopts the statement of the case made by the Petitioners, Gloria Kurns and Freida Jung Corson. NARVRE supplements their statement as follows.

In 1911, Congress enacted the Boiler Inspection Act ("BIA"), which made it unlawful for common carriers "to use any locomotive in moving interstate or foreign traffic unless the boiler" or its appurtenances were "in proper condition and safe to operate" in "active service". ch. 103, 36 Stat. 913. In 1915, Congress amended the statute to apply to the entire locomotive and tender; and it became known as the Locomotive Inspection Act ("LIA"). ch. 169, 38 Stat. 1192. The LIA was codified at 45 U.S.C. §§ 22-34. Section 5 of the LIA, codified at 45 U.S.C. § 28, gave the Interstate Commerce Commission ("Commission"), which at the time had the authority now possessed by the Secretary of Transportation ("Secretary"), authority to issue or approve rules regarding locomotives used by common carriers.

When the LIA was passed, the railroad carriers had in place rules and instructions for the inspection of their locomotive boilers and appurtenances. *United States v. Baltimore & O. R.R. Co.*, 293 U.S. 454, 460 (1935). Under Section 5 of the LIA, those rules and instructions came under authority of the Commission and became the starting point for the Commission's rule making. *Id.*, at 461. A railroad carrier's rules became "obligatory upon such carrier" once the Commission approved its rules. BIA, § 5, 36 Stat. 914-915. If the carrier failed to file rules and instructions, Section 5 gave the federal inspector

authority to prepare rules and instructions for the carrier; and they became obligatory upon the carrier once approved by the Commission. *Ibid.*[2] This Court has found that these provisions authorized the Commission to act on its own initiative to require modification of the carriers' rules and instructions. *U. S. v. Baltimore & O. R.R. Co.*, 293 U.S. at 461.

In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA"). Pub. L. No. 91-458, 84 Stat. 971.[3] The

---

[2] Section 5 of the BIA provided:

Sec. 5. That each carrier subject to this Act shall file its rules and instructions for the chief inspector within three months after the approval of this Act, and after hearing and approval by the Interstate Commerce Commission, such rules and instructions, with such modifications as the commission requires, shall become obligatory upon such carrier: Provided, however, That if any carrier subject to this Act shall fail to file its rules and instructions the chief inspector shall prepare rules and instructions not inconsistent herewith for the inspection of locomotive boilers, to be observed by such carrier; which rules and instructions, being approved by the Interstate Commerce Commission, and a copy thereof being served upon the president, general manager, or general superintendent of such carrier, shall be obligatory, and a violation thereof punished as hereinafter provided: Provided also, That such common carrier may from time to time change the rules and regulations herein provided for, but such change shall not take effect and the new rules and regulations be in force until the same shall have been filed with and approved by the Interstate Commerce Commission. The chief inspector inspection shall also make all needful rules, regulations, and instructions not inconsistent herewith for the conduct of his office and for government of the district inspectors: Provided, however, That all such rules and instructions shall be approved by the Interstate Commerce Commission before they take effect.

[3] The FRSA was originally codified at 45 U.S.C. § 421 *et seq.* In 1994, its provisions were recodified in Title 49, without substantive change. See Act of July 5, 1994, Pub.L. No. 103-

FRSA empowers the Secretary to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect" at the time that the FRSA was enacted. 49 U.S.C. § 20103(a). The same chapter of the FRSA provides an express preemption provision, which authorizes states to regulate railroad safety until the Secretary has taken action to cover the same subject matter. 49 U.S.C. § 20106(a)(2). That express preemption provision provides:

> *A State may adopt or continue in force a law, regulation, or order related to railroad safety* or security *until the Secretary of Transportation* (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), *prescribes a regulation or issues an order covering the subject matter of the State requirement.* A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—
>
> (A) is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> (B) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (C) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106(a)(2) (emphasis added).[4] The Secretary

272, 108 Stat. 745. This brief cites the statutory provisions as recodified in Title 49, except to refer to citations to the FRSA made in court opinions.

[4] Prior to 1994, the provision provided in relevant part, "[a] State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434 (1981).

has not promulgated a rule or taken other action covering the subject matter of asbestos content in products used on locomotives.

In 1994, Congress recodified laws regarding transportation as Subtitles II, III and V-X of Title 49 of the United States Code ("Code"). Pub.L. 103-272, 108 Stat. 745. The purpose was to restate the laws in comprehensive form, without substantive change, and eliminate obsolete laws. S. Rep. No. 103-265, page 1. Portions of the LIA were recodified at Chapter 207 of Title 49, where they encompass three provisions, 49 U.S.C. §§ 20701-20703.[5] In particular, Section 5 of the LIA, 45 U.S.C. § 28, was not recodified; and the remaining provisions from the LIA do not authorize the Secretary to promulgate rules regarding locomotives, railroad safety, or any other matter.

In 2007, Congress added 49 U.S.C. § 20106(b) and (c) in response to *Lundeen v. Canadian Pac. Ry. Co.*, 447 F.3d 606 (8th Cir. 2006) (*Lundeen I*). The effect of the amendment was to confirm that a state cause of action is not preempted where the defendant violates a federal regulation on the same subject matter as state law. *Lundeen v. Canadian Pac. Ry. Co.*, 532 F.3d 682, 690 (8th

---

[5] Three sections of the LIA were repealed without replacement in 1994, specifically 45 U.S.C. § 22, setting forth definitions of terms in the LIA, § 31 providing for an annual report by the director of locomotive inspection, and § 34, providing for penalties. Even before those LIA provisions were rendered redundant with the enactment of the FRSA, much of the LIA had been redacted. 45 U.S.C. §§ 24-27 were omitted pursuant to the Reorganization Plan Number 3 of 1965. The Plan abolished the offices of locomotive inspection, which were established pursuant to the LIA, and transferred the responsibilities to the Interstate Commerce Commission. 30 Fed. Reg. 9351, 79 Stat. 1320 (1965).

Cir. 2008) (*Lundeen II*).[6] However, because the Secretary has never issued regulations covering the subject matter of asbestos on locomotives, § 20106(b) does not govern preemption in this suit.

---

[6] *Lundeen I* and *II* concerned a train derailment in Minot, North Dakota, alleged to have been caused by failure of the track. The issue was federal preemption of the state law claims based in part on negligent inspection of railroad track. In *Lundeen I*, the court found that there were federal regulations covering the subject matter of track inspections and thus preemption of the state law claims under 49 U.S.C. § 20106(a)(2). *Id.*, at 614, 615. After the 2007 amendment, the court which had decided *Lundeen I* found that the effect of the 2004 amendment was to clarify that a state cause of action is not preempted where the defendant violates both state law and a federal regulation on the same subject matter. *Lundeen II*, 532 F.3d at 690. The court explained that "§ 20106 had been interpreted in such a way that an injured person was denied the mere chance to hold a railroad accountable when its negligence not only violated state common law standards, but the very federal laws and regulations approved by Congress in an effort to further railroad safety. It was rational for Congress to 'clarify' this result was not an intended purpose of § 20106 prior to the amendment." *Ibid.*

SUMMARY OF ARGUMENT

The issue in this appeal arises out of the construction of two statutes, the Federal Railroad Safety Act ("FRSA") and Locomotive Inspection Act ("LIA"). This Court has interpreted each statute with regard to preemption and attributed a different preemption standard to each. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 613 (1926). In *Napier*, the Court based its finding of preemption on its construction of Section 5 of the LIA, and Congress has since repealed that section. As such, only the construction of the FRSA remains relevant; and the FRSA expressly authorizes the Petitioners' state law claims.

In *Napier*, the Court found that the LIA preempted state statutes that required particular safety equipment to be installed on locomotives in use on a railroad line. *Id.*, 272 U.S. at 613. The *Napier* decision was grounded on the construction of the LIA and particularly Section 5 of the Act, which gave the Commission the authority to set standards for the safety of locomotives in use. *U. S. v. Baltimore & O. R.R. Co.*, 293 U.S. at 460-461; *see also Napier*, 272 U.S. at 607. However, since the LIA's adoption in 1911, its provisions have been repealed; and only a few provisions were recodified. There is no direct replacement for Section 5 of the LIA. Prior to the repeal of Section 5 of the LIA, the FRSA gave the Secretary rule making authority with regard to all subjects of railroad safety; and Section 5 of the LIA had been rendered moot. Because Section 5 of the LIA has been repealed, the Court's interpretation of that section in *Napier* is not controlling in this case.

Congress declared that the FRSA's purpose was "to promote safety in every area of railroad operations" and

thus extended the Secretary's rule making authority to encompass "every area of railroad safety". 49 U.S.C. §§ 20101 and 20103(a). At the same time that Congress broadened the Secretary's authority, Congress included a preemption provision which expressly authorizes the states to regulate railroad safety matters unless the Secretary takes action with regard to the same subject matter. 49 U.S.C. § 20106(a)(2). According to its terms, the FRSA express preemption provision applies "with respect to railroad safety matters". 49 U.S.C. § 20106(a)(2). The express preemption standard applies to every railroad safety matter, and this Court rejected the argument that § 20106(a)(2) applies only with regard to possible preemption by the FRSA itself. *Easterwood*, 507 U.S. at 663, fn. 4. The FRSA's express preemption provision is the standard for whether federal law preempts the Petitioners' state-law claim.

The FRSA preemption provision expressly authorizes states to enforce their laws with regard to railroad safety until specifically preempted by federal regulatory action. The preemption clause is preceded by a savings clause, providing that a "State may adopt or continue in force a law, regulation, or order related to railroad safety". 49 U.S.C. § 20106(a)(2). Such state law remains in effect until the Secretary "prescribes a regulation or issues an order covering the subject matter of the State requirement." *Ibid.* Thus, state law is not preempted by congressional act (such as the LIA), but only by specific regulatory action. The Secretary has not issued orders or regulations covering the subject matter of asbestos, insulation content, or related warnings; and Petitioners' state law claims are preserved by the FRSA.

ARGUMENT

I. THE LOCOMOTIVE INSPECTION ACT WAS REPEALED, AND THE FEW RECODIFIED PROVISIONS CANNOT PROVIDE THE BASIS FOR PREEMPTION

This Court has explained that the basis of the decision in *Napier* was the "conclusion that the Commission possesses the authority to make rules on its own initiative, or upon complaint". *U.S. v. Baltimore & O. R.R. Co.*, 293 U.S. at 461. This determination was one of statutory construction of the LIA; and, as such, "the provisions of the act were necessarily examined." *Ibid.*; *see also Napier*, 272 U.S. at 607. Because it is "axiomatic, of course, that statutory construction must begin with the language of the statute itself", consideration of this appeal should begin with the language of the LIA. *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187 (1980). Since 1926 when *Napier* was decided, the LIA has been repealed and replaced with different language in a different title of the U.S. Code. The alteration of what was the LIA is therefore the starting point of this analysis.[7]

In *U.S. v. Baltimore & O. R.R. Co., supra*, the Court found that the LIA conferred quasi legislative functions under Section 5 (codified at 45 U.S.C. § 28) and quasi judicial functions under Section 6 of the act (codified at 45 U.S.C. § 29). *Id.*, 293 U.S. at 460. The Court's

---

[7] NARVRE agrees with Petitioners that *Napier* applied only to the use of a locomotive and does not support preemption of Petitioners' state law claims. (Brief of Petitioners, at 36). Further, NARVRE takes the position stated herein, that Congress has repealed the provision interpreted by *Napier*, rendering that decision moot.

construction of Section 5 provided the basis for the conclusion that the LIA gave the Commission rule making authority over requirements for locomotives. In the decision from which this appeal is taken, the Third Circuit likewise found that Section 5 was the basis for the Secretary's regulatory authority. *Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392, 397, fn. 4 (3d Cir. 2010) *cert. granted*, No. 10-879 (June 6, 2011) (citing 45 U.S.C. § 28).[8] In its 1916 Annual Report, the Commission recognized that its authority to establish new locomotive inspection rules was "provided in section 5 of the locomotive boiler inspection law". *Thirtieth Annual Report of the Interstate Commerce Commission*, December 1, 1916, page 56.

The Secretary's authority to make rules on its own initiative was not set forth expressly in the LIA's Section 5, 45 U.S.C. § 28. The statute gave the director of locomotive inspection the express authority to approve rules filed by individual railroads and prepare rules for railroads that fail to do so. The director of locomotive inspection was also given authority to "make all needful rules for the conduct of his office and for the government of the district inspectors". LIA, *supra*, Section 5. The Court found that the Commission's authority to make rules on its own initiative was implied. *U.S. v. Baltimore & O. R. Co.*, 293 U.S. at 461. The Court explained that "the responsibility for rules adequate to insure safety was imposed by Congress upon the Commission; and, to discharge that duty, it was essential that the Commission also should possess the initiative in rule making. To this end, it was granted the power, not only of disapproving proposed rules, but also of requiring modifications of those in force." *Ibid.*

---

[8] The Third Circuit cited 45 U.S.C. § 28 but did not address its repeal.

The rule making authority which the Court inferred from 45 U.S.C. § 28 was later made express by Congress within a broader grant of authority in the FRSA. In 1970, Congress enacted the FRSA with the declared purpose to "promote safety in every area of railroad operations". 49 U.S.C. § 20101. The FRSA granted rule making authority over every area of railroad safety to the Department of Transportation, providing that its Secretary shall "as necessary, prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect" on the date of the FRSA's enactment. 49 U.S.C. § 20103(a). The grant of authority to promulgate railroad safety rules included authority to supplement provisions of the LIA that remained in effect at the time; and under § 20103(a), "the Secretary of Transportation has the authority to issue appropriate regulations relating to safety appliances and equipment on railroad engines and cars." *Eckert v. Aliquippa & Southern R. Co.*, 828 F.2d 183, 186 (3d Cir. 1987) (citing 45 U.S.C. § 431, the predecessor to 49 U.S.C. § 20103(a)).

The FRSA also subsumed the role of the LIA in extending the protections of the Federal Employers' Liability Act ("FELA"), 45 U.S.C § 51, *et seq*. Unlike the state common-law under which the Petitioners have brought this suit, the LIA does not create a cause of action. However, *per se* liability is established under the FELA where there is a violation of the LIA or Safety Appliance Act ("SAA"). Under the FRSA, *per se* liability under the FELA was extended to violation of regulations authorized by the FRSA. 45 U.S.C. § 54a; *see also Eckert, supra*, at 186.[9]

---

[9] 45 U.S.C. § 54a was codified at 45 U.S.C. § 437(c) with the adoption of the FRSA in 1970. In 1994, it was recodified at 45 U.S.C. § 54a as part of Public Law 103-272, 108 Stat. 1365.

In light of these new provisions, the Secretary recommended repeal of the LIA in connection with adoption of the FRSA. S. Rep. No. 91-619, page 16. The Senate Report includes a letter written by the Secretary to the chairman of the Senate committee, focusing on the relationship between state and federal regulation.[10] The Secretary observed that the bill preserved what remained of the LIA and a portion of the SAA, and he commented "I do not see the need for preservation of these particular statutes." *Ibid.*

Notwithstanding the Secretary's recognition that the FRSA would render existing provisions of the LIA unnecessary, Section 5 of the LIA (45 U.S.C. § 28) remained in the Code following the adoption of the broader grant of authority under the FRSA. 49 U.S.C. § 20103(a). The narrower LIA provision was finally repealed in 1994 by Public Law 103-272, which was enacted to consolidate laws related to railroad safety "without substantive change" and make "other technical improvements in the Code". S. Rep. No. 103-265, page 1. Among the technical improvements, the recodification eliminated obsolete laws. *Ibid.* The authority to promulgate rules regarding locomotives, granted by 45 U.S.C. § 28, had been rendered obsolete in 1970, when Congress gave the Secretary broad authority to promulgate regulations regarding all areas of railroad safety in the FRSA. When 45 U.S.C. § 28 was repealed, only a portion was recodified at 49 U.S.C. § 20702(d),

---

[10] The letter notes that action on the bill was delayed "so that (the Department of Transportation) could study the provisions of the committee print, particularly those dealing with Federal/State relations, and discuss them with representatives of the National Association of Regulatory Utility Commissioners (NARUC)." S. Rep. No. 91-619, at 13.

allowing that a "railroad carrier may change a rule or instruction of the carrier governing inspection by the carrier of locomotives and tenders" when the request is approved by the Secretary. There is nothing in the portion carried over from the original LIA provision to suggest that it might serve as the source of the Secretary's authority to make rules on his or her own initiative. In contrast, the authority granted in the FRSA, originally at 45 U.S.C. § 431(a)(1), was carried over in full by 45 U.S.C. § 20103(a); and that statute continues to grant the Secretary rule making authority for all areas of railroad safety, including the safety of locomotives.

The finding of field preemption in *Napier* was based upon the Commission's authority to set requirements for locomotives in use. *Napier*, 272 U.S. at 613. The state statutes at issue in *Napier* required that particular equipment be included on locomotives used in the state, and the Court held that the state requirements were precluded so that the "standard set by the Commission" under the authority granted by the LIA would prevail. *Ibid.* The LIA no longer provides that authority. Rather, the standards are now set by the Secretary pursuant to rule making authority granted by the FRSA. Section 5 of the LIA has been repealed by Congress and its role is subsumed within the authority granted by the FRSA, which was matched with an express preemption provision within the same act.

Congress's treatment of the LIA does not support continued adherence to a preemption standard that was implied by a provision that has since been repealed, particularly in light of Congress's express standard in the FRSA. What remain from the provisions of the LIA are three provisions in Title 49. 49 U.S.C. §§ 20701-20703. None of the three provisions authorizes the Secretary to make rules regarding locomotives or railroad safety. The

foundation for *Napier* has been completely eroded; and now the test for preemption with respect to railroad safety is provided by the FRSA, as discussed below.

II. LEGISLATIVE HISTORY OF THE FRSA, FOUND IN THE SENATE REPORT AND HOUSE REPORT, REVEALS CONGRESS'S INTENT TO REPLACE FIELD PREEMPTION ATTRIBUTED TO THE LIA IN THE PAST AND PRESERVE STATE LAW

The FRSA was enacted following a long period of weak regulation of the railroad industry, as documented in the legislative history of the FRSA reported at Senate Report 91-619 and House Report 91-1194. S. Rep. No. 91-619 (1969); H. Rep. No. 91-1194 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4104. The Committee on Commerce, which prepared the Senate Report, "recognized that the railroad industry is the only mode of transportation in the United States which presently is not subject to comprehensive Federal safety regulations." S. Rep. No. 91-619, page 1. Federal law did not keep up with changes in the industry and its equipment. The Committee reported that the rail safety statutes each applied to "some very specific safety hazard." *Id.*, at 4. The Committee added that the "majority of these statutes are from 50 to 75 years old and were written when technology was quite different" from what it had become at the time of the report. *Ibid.*

Both the Senate Report and House Report include in their appendices the *Report of the Task Force on Railroad Safety*, submitted to the Secretary of Transportation on June 30, 1969. S. Rep. No. 91-619, App. A, at 29; H. Rep. No. 91-1194, App. F, 1970 U.S.C.C.A.N. at 4125. The Joint Task Force included the Chairman of the Federal

Railroad Administration ("FRA") and representatives from the American Association of Railroads, individual railroads, labor, and state regulators. S. Rep. No. 91-619, page 34. The Joint Task Force described railroad safety as "a problem, national in scope, *of concern* to Federal and *State* Governments". *Id.*, at 32 (emphasis added). The Joint Task Force recommended that railroad safety be administered through a "federal-state partnership" and that "[e]xisting state rail safety statutes and regulations remain in force until and unless preempted by federal regulation." *Id.*, at 33.

The House Committee on Interstate and Foreign Commerce acknowledged that the LIA and other existing railroad statutes "served well" and would be "continued without change", but the committee reported in the same paragraph that the LIA and other same statutes would be supplemented by state law:

> These particular laws have served well. In fact the committee chose to continue them without change. It is recognized, however, that they meet only certain and special types of railroad safety hazards. ... Consequently, there is a strong consensus which makes it appear clearly that the time is now here for broadscale federal legislation with provisions for state participation to assure a much higher degree of railroad safety in the years ahead.

H. Rep. No. 91-1194, 1970 U.S.C.C.A.N. at 4105. The language "the time is now" and "in the years ahead" indicate that the law would be changed, even without a change in the language of the LIA. *Ibid.* The House committee determined that a change authorizing state regulation would "assure a much higher degree of railroad safety in the years ahead." *Ibid.*

The House committee gave greater deference to state

law by replacing preemption where there is federal "authority" to preemption where there is federal "action":

> At the present time where the federal government has authority, with respect to rail safety, it preempts the field. With respect to the reported bill, the task force recommended that existing state requirements remain in effect until preempted by federal action.

Id. at 4108. Each of the two sentences in the passage above refers to a different time frame. The first sentence containing the phrase "[a]t the present time" refers to the period of time before passage of the bill and describes the condition of the law before the bill was passed; whereas, the phrase in the second sentence, "[w]ith respect to the reported bill", refers to the law as intended with passage of the bill. Thus, reference in the first sentence to "preempts the field" merely reflects the understanding of the law before passage of the bill; and the second sentence describes a new standard to replace the field preemption standard. The second sentence reflects a change from preemption by "authority," which had been attributed the LIA and SAA in the past, to preemption by actual "federal action," which refers to regulation or order of the Secretary through the FRA.

In their summary, the House committee connected preservation of state law with the purpose of the FRSA, which was "to promote safety in all areas of railroad operations, to reduce railroad related accidents, and to reduce deaths and injuries to persons and damage to property caused by accidents involving any carrier of hazardous materials." *Id.*, at 4112. For this purpose, the House committee included a section that "authorizes states to regulate in any area of railroad safety until the Secretary acts with respect to the particular subject matter." *Ibid.*

The preemption statute which was adopted reflects this distinction between preemption by federal legislation and preemption by regulatory action. It provides that the state has the authority to regulate railroad safety until the Secretary "prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). The Secretary has the authority to regulate in every area of railroad safety (49 U.S.C. § 20103(a)), but that authority does not preempt state law until exercised as to a particular subject matter.

III. THE FRSA EXPRESSLY AUTHORIZES PETITIONERS' COMMON LAW CLAIMS FOR INJURY

A. The FRSA Preemption Provision Establishes A Presumption Of State Authority With Regard To Railroad Safety, And Exceptions To State Authority Are Not Satisfied So As To Preempt Petitioners' Claims

The Petitioners' state law claims are expressly authorized by the FRSA preemption provision, which provides that a "State may adopt or continue in force a law, regulation or order related to railroad safety". 49 U.S.C. § 20106(a)(2). State law remains in force until such time that the Secretary "prescribes a regulation or issues an order covering the subject matter of the State requirement." *Ibid.* The statute is unlike most preemption provisions in that it does not state that a limited field of state law is preempted, implying by the principle of *expressio unius est exclusio alterius* that matters beyond its reach are not preempted. It does more.

The terms of the statute directly authorize state law in the field of railroad safety, unless there is regulation by the Secretary covering the same subject matter. It might therefore be described more accurately as a savings clause.

The effect of § 20106(a)(2) is that a grant of federal authority alone does not preempt state law regarding railroad safety. Rather, the authority of the state is presumed; and preemption requires specific federal rules, regulations, or orders. Further, by limiting preemption to those federal actions that "cover[]" the subject matter of state law, Congress confined preemption to those subjects where the federal regulations "substantially subsume the subject matter of the relevant state law." *Easterwood*, 507 U.S. at 664. It is not enough to show that the federal regulations "touch upon or relate to" the same matters as state law. *Ibid.* The federal rule must substantially occupy the place of state law.

Petitioners' claims for injury from asbestos dust fall within the scope of state law "related to railroad safety." 49 U.S.C. § 20106(a)(2). In *Urie v. Thompson*, 337 U.S. 163 (1949), the Court established that railroad safety laws include within their protection the health of a railroad worker and risks from exposure to airborne dust on locomotives in use. *Id.*, at 193. By its express language, the FRSA preemption provision governs the question of whether federal law preempts state law claims arising out of exposure to health risks, such as airborne asbestos.

It is anticipated that Respondents will take the position that a state may not adopt or continue in force a law related to rail safety on locomotives. That position would violate the express will of Congress, that a "state may adopt or continue in force a law, regulation or order related to railroad safety", unless Respondents can satisfy

the requirements of the exemption by demonstrating that the Secretary, through regulatory action, has "cover[ed] the subject matter" the Petitioners' claims. 49 U.S.C. § 20106(a)(2).[11]

State law claims for personal injury compensation are not a subject matter covered by the Secretary's regulations. The Secretary has issued no regulation covering compensation for injury from a product at a railroad. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Court recognized that an award in a personal injury suit brought under state common law was not within the preempted field, even though the federal government had occupied the entire field of nuclear safety concerns. *Id.*, at 249. There is nothing in the language or legislative history of the FRSA to suggest that Congress intended to preempt claims for personal injury brought pursuant to common law. Moreover, the Secretary's regulations do not cover the field of asbestos on locomotives, composition of insulation on locomotives, composition of railroad brake shoes, or the warnings that are reasonably required by the asbestos hazards on locomotives.

This Court has held that, with regard to either express or implied preemption, "the absence of a federal standard cannot implicitly extinguish state common law." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 282 and 289 (1995). Regardless of the reason for the absence of federal

---

[11] As demonstrated by Petitioners, Respondents will have the additional burden of demonstrating that states may not enforce their laws with regard to equipment being repaired in shops, where the LIA never actually regulated the equipment. (Brief for Petitioners, at 20). In addition, Congress expressly authorized the states to enforce their laws related to railroad safety when the FRSA became law in 1970.

regulation of asbestos on locomotives and related warnings, the Petitioners' state common law claims are authorized by Congress in the absence of such regulation.

The Petitioners' common law claims for failure to warn, defective design, and implied warranties are not preempted unless the Secretary has prescribed regulations or issued orders covering the same subject matters. The Secretary has not, and there is no preemption of the Petitioners' claims.

B. The Preamble To The Preemption Provision And The Provision's Requirements For State Laws That Are More Stringent Than Federal Standards Do Not Affect Petitioners' State Law Claims

The savings clause at 49 U.S.C. § 20106(a)(2) is preceded by a preamble, which provides that "[l]aws, regulations, and orders related to railroad safety…shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). The preamble recognizes variation among states by limiting uniformity to the extent it is "practicable." There is no provision for establishing uniformity other than the express preemption provision at § 20106(a)(2). The statute serves the expressed interest in uniformity by providing for preemption within those subject matters covered by federal action, and the Secretary is free to preempt state law as to any subject matter by simply regulating that subject matter to the extent authorized by § 20103. Moreover, the Petitioners' claim presents no threat to national uniformity. There has been no suggestion on the record that any state's law would require the use of asbestos on a locomotive or prohibit a reasonable warning about the danger of

exposure to airborne asbestos. In *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008), the Court undercut the fiction that states may not enforce similar common law standards because doing so would frustrate the purpose of providing an industry with a uniform national standard. *Id.*, at 79, 80.

In addition to preserving state law where federal action does not cover the same subject matter, the savings clause preserves state law under limited circumstances where state law and federal action do cover the same subject matter, set forth at § 20106(a)(2)(A)-(C). The additional requirements at § 20106(a)(2)(A)-(C) are relevant only where there is federal regulation covering the same subject matter as the state law and the state law is more burdensome. Because there is no federal regulation by the Secretary covering the subject matter of Petitioners' claims, the additional requirements at § 20106(a)(2)(A)-(C) are not relevant. A plaintiff bringing a claim arising out of exposure to asbestos on a locomotive need not satisfy the requirements at § 20106(a)(2)(A)-(C).

IV. THE FRSA PREEMPTION PROVISION IS APPLICABLE TO PETITIONERS' CLAIMS, AS CONFIRMED BY ITS LOCATION IN THE FEDERAL CODE AND THIS COURT'S INTERPRETATION OF THE PROVISION

A. Given Their Relative Locations Within The Federal Code, The FRSA Preemption Provision Governs Preemption For The LIA Provisions

The preemption provision was adopted in 1970 at 45 U.S.C. § 434. The section was recodified at 49 U.S.C. §

20106 on July 5, 1994, when all statutes governing Rail Programs were consolidated in Subtitle V of Title 49. Pub.L. 103-272, 108 Stat. 745. This reorganization of the Federal Code affected provisions originally adopted as the FRSA and LIA, and the new organization confirms that the express preemption provision is to be read in *pari materia* with the remaining provisions of the LIA. The preemption provision is now part of an organized and consolidated set of provisions that govern rail safety (PART A of Subtitle V of Title 49), which also includes the current version of the remaining LIA provisions.

Railroad legislation is organized comprehensively within Subtitle V of Title 49, titled "Rail Programs". 49 U.S.C. §§ 20101 – 28505. PART A of Subtitle V is titled "Safety", and its chapters are as follows:

Ch. 201—GENERAL (§§ 20101-20167)
Ch. 203—SAFETY APPLIANCES (§§ 20301-20306)
Ch. 205—SIGNAL SYSTEMS (§§ 20501-20505)
Ch. 207—LOCOMOTIVES (§§ 20701-20703)
Ch. 209—ACCIDENTS AND INCIDENTS (§§ 20901-20903)
Ch. 211—HOURS OF SERVICE (§§ 21101-21109)
Ch. 213—PENALTIES (§§ 21301-21311)

The three provisions which recodify the surviving provisions of the LIA are found within PART A, Chapter 207, titled "LOCOMOTIVES". Chapter 207 is part of the framework of PART A, which is generally governed by the provisions set forth in Chapter 201, titled "GENERAL". For example, Chapter 201 sets forth definitions for the whole of PART A (49 U.S.C. § 20102), the scope of the regulatory authority of the Secretary over rail safety (49 U.S.C. § 20103), the Secretary's authority to carry out rail-safety inspections and investigations (49 U.S.C. § 20107), and the states' authority to conduct rail-safety inspections and investigations (49 U.S.C. § 20105). Likewise, Chapter

201 includes the FRSA express preemption provisions, which is to be applied throughout PART A (49 U.S.C. § 20106(a)(2)).

In § 20105, which is codified within Chapter 201 along with § 20106, Congress gives the states the opportunity to participate in the enforcement of regulations concerning rail safety, specifically including "rolling stock". 49 U.S.C. § 20105(a). The definition of "rolling stock" includes locomotives. 49 C.F.R. § 224.5. If certified, the states' enforcement authority under the FRSA thus extends to locomotives, which are the subject of the LIA and its successor, Chapter 207. 49 U.S.C. § 20105(d). This section demonstrates that the authority over railroad safety granted in Chapter 201 extends to regulation of "railroad equipment" and "rolling stock" in Chapter 207.

It is recognized that the Secretary's rule making authority granted in Chapter 201 includes regulation of locomotives. *Eckert*, 828 F.2d at 186. As such, authorization of state law found within Chapter 201, at § 20106, likewise extends to regulation of locomotives in Chapter 207, which is the successor to the LIA. In 1970, Congress granted the Secretary one standard for rule making authority for all issues of railroad safety, now at § 20103, and simultaneously provided one standard for preemption in § 20106 applicable to all railroad safety issues. The 1994 repeal of Section 5 of the LIA and organization of the code clarified that point.

B. This Court Has Already Given The FRSA Preemption Provision Broad Application To All Matters Of Railroad Safety In *CSX Transp., Inc. v. Easterwood* And Found That The Provision Grants Deference To State Law

Even before the reorganization of railroad safety statutes on July 5, 1994, this Court found that the preemption provision (then 45 U.S.C. § 434, now 49 U.S.C. § 20106(a)(2)) applies beyond the scope of the FRSA. *Easterwood*, 507 U.S. at 663.[12] *Easterwood* was a grade crossing case. The plaintiff's decedent was killed when his truck collided with a CSX train at a crossing. The plaintiff alleged that CSX was negligent in operating the train at an excessive speed and failing to maintain adequate warning devices at the crossing. The defendant CSX argued that each of the plaintiff's negligence claims was preempted by railroad safety regulations promulgated by the Secretary of Transportation, through the FRA and the Federal Highway Administration ("FHWA"). The Court applied the preemption provision from the FRSA, both with respect to the FRA and FHWA regulations, and found preemption for the excessive speed theory but not for the claim based upon inadequate warning devices. *Id.*, 507 U.S. at 667, 675.

At footnote 4, the Court addressed the erroneous

---

[12] The Court applied its holding in *Easterwood* to another rail crossing case after the 1994 recodification. *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000). The Court's method of analysis was the same; and again the Court applied § 20106(a)(2) to evaluate preemption of state common law by a regulation authorized by to a statute other than the FRSA, specifically the Federal Railway-Highway Crossings Program. *Id.*, at 352.

finding of the Court of Appeals, that the preemption provision (then § 434) did not govern preemptive effect of regulations unless promulgated pursuant to the FRSA. *Easterwood*, 507 U.S. at 663. The Court stated that the "plain terms of § 434 do not limit the application of its express preemption clause to regulations adopted pursuant to the FRSA. Instead, they state that any regulation 'adopted' by the Secretary may have preemptive effect, regardless of the enabling legislation." *Id.*, fn 4. The preemption provision applies by its own terms, not in accordance with the bounds of enabling legislation.

The Court found that the railroad's common law duties under state law are within the field of law addressed by the FRSA preemption provision:

> According to § 434, applicable federal regulations may preempt any state "law, rule, regulation, order, or standard relating to railroad safety." Legal duties imposed on railroads by the common law fall within the scope of these broad phrases. ... Thus, the issue before the Court is whether the Secretary of Transportation has issued regulations covering the same subject matter as Georgia negligence law pertaining to the maintenance of, and the operation of trains at, grade crossings.

Easterwood, 507 U.S. at 664; *citing Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992). In the passage above, the Court explained that common law negligence claims may be preempted by federal action under the FRSA; however, the scope of state law that may be preempted is coterminous with the scope of state law that is preserved by the FRSA until preempted by federal action. The Court observed that the state common law negligence claim is a state "law, rule, regulation order or

standard relating to railroad safety", as that language is used in the FRSA preemption provision. *Ibid.* Within § 20106(a)(2), that expression follows the language authorizing state law, providing that "[a] State may adopt or continue in force any" such law. In other words, a state common law negligence claim is authorized by the FRSA provision; and the scope of the savings clause includes the Petitioners' claims.

Easterwood provides the appropriate interpretation of § 20106(a)(2), rather than the earlier opinion of the Ninth Circuit in *Marshall v. Burlington N., Inc.*, 720 F.2d 1149 (9th Cir. 1983). In *Marshall*, the court found that § 20106(a)(2) applies only to "new areas of federal railroad regulatory jurisdiction"; but this Court subsequently rejected that approach in *Easterwood*, finding that "the plain terms of (§ 20106(a)(2)) do not limit the application of its express preemption clause to regulations adopted by the Secretary pursuant to FRSA." *Marshall*, at 1153; *Easterwood*, at 663.[13] Cases which followed *Marshall* rather than *Easterwood* were thus decided in error.[14]

Marshall is factually distinguishable from this matter because the state-law claim in *Marshall* was based upon a

---

[13] The reasons for applying § 20106(a)(2) have become clearer since *Marshall* was decided. As noted above, the 1994 act that finally removed Section 5 of the LIA from the code, along with other provisions deemed by Congress to be obsolete, confirmed that § 20103 and § 20106 apply to all areas of railroad safety.

[14] See e.g., *Law v. Gen. Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997)(wherein the court cited *Easterwood* on other grounds but ignored this Court's holding that § 20106 applies beyond the FRSA); *Springston v. Consol. Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997)(wherein the court declined to follow the FRSA without discussing *Easterwood*); *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458, 462 (2d Cir. 1999) (same).

standard that was covered by the Secretary's regulations. The suit arose out of a fatal collision between the decedent's truck and a locomotive that "was equipped with a bell, a whistle, two front white headlights, one right above the other, and a revolving amber light behind and above the headlights." *Id.*, at 1151. The plaintiff's state law claim was "premised largely on the alleged inadequacy of these devices as warning equipment." *Ibid.* At the time of the collision, the Secretary had in place regulations covering the subject matter of whistles and headlights, requiring that the locomotives have a "suitable whistle" and a headlight meeting specific performance requirements. 49 C.F.R. §§ 230.231(a), 230.234 (1978). The *Marshall* court found that the "Burlington freight train met these requirements." *Ibid.* The preemption provision at § 20106(a)(2) would have authorized the plaintiff's suit in *Marshall* only "until the Secretary ... prescribe[d] a regulation or issue[d] an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2).

Consol. Rail Corp. v. Pennsylvania Pub. Util. Comm'n, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem. sub nom.*, 461 U.S. 912 (1983), is also not to the contrary. The district court there found that the LIA preempted a state statute requiring particular equipment to be installed on locomotives used in the state. This Court and the court of appeals summarily affirmed the decision of the district court. *Pennsylvania Pub. Util. Comm'n v. Consol. Rail Corp.*, 461 U.S. 912 (1983). But there were multiple bases for affirming the district court in *Consolidated Rail*. The district court found that the Secretary of Transportation had promulgated a regulation covering the same subject matter as the state

statute. The court accordingly held that the FRSA independently preempted the state requirement, regardless of the preemptive effect of the LIA. *Consol. Rail Corp.*, 536 F. Supp. at 658. A summary affirmance is not precedent where two different possible explanations for affirmance exist. *City of Akron v. Akron Center for Reproductive Rights*, 462 U.S. 416 (1983); *overruled on other grounds in Gonzalez v. Carhart*, 550 U.S. 124 (2007).

Consolidated Rail is thus different from this case, both because it involved state *legislation*, rather than common law claims, and because, here, the Secretary has issued no regulation covering the subject matter of Petitioners' claims. Here, § 20106(a)(2) authorizes the common law relied upon by Respondents because federal regulations do not occupy the same subject matter; and there could be no implied preemption under the LIA without violating the express authorization of Congress.

In *Easterwood*, the Court described § 20106(a)(2) as "a provision that displays considerable solicitude for state law in that its express preemption clause is both prefaced and succeeded by express saving clauses." *Easterwood*, 507 U.S. at 665 (citation omitted). The Court found that Congress's use of the word "covering" within the first savings clause in § 20106(a)(2) has the effect of narrowing the scope of preemption. *Easterwood*, 507 U.S. at 664. The party claiming that railroad regulations preempt state law for a subject matter "must establish more than that they 'touch upon' or 'relate to' that subject matter, for 'covering' is a more restrictive term which indicates that preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Ibid.* (internal citation omitted).

The Secretary has not promulgated a rule or taken

action covering the subject matter of Petitioners' claim for compensation. Nor has the Secretary promulgated a rule or taken action covering the subject matter of the use of asbestos on locomotives, composition of insulation on locomotives, composition of railroad brake shoes, or the warnings that are reasonably required by the asbestos hazard. The word "asbestos" does not even appear in the FRA regulations, 49 C.F.R. §§ 200 through 268. Consistent with the Court's findings in *Easterwood*, Petitioners' claim under state common law is authorized by Congress in the FRSA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

WILLARD J. MOODY, JR.
THE MOODY LAW FIRM, INC.
500 Crawford Street
Suite 300
Portsmouth, Virginia
23705
(757) 393-6020

MARC C. GRECO
Counsel of Record
RICHARD S. GLASSER
KIP A. HARBISON
GLASSER AND GLASSER, P.L.C.
Crown Center, Suite 600
580 E. Main Street
Norfolk, Virginia 23510
(757) 625-6787
(marcg@glasserlaw.com)

August 19, 2011

AMICUS CURIAE BRIEF

No. 10-879

IN THE

Supreme Court of the United States

GLORIA GAIL KURNS, Executrix of the Estate of George M. Corson, Deceased, and FREIDA E. JUNG CORSON, Widow in her own right,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION and VIAD CORP.,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RESPONDENTS

HUGH F. YOUNG, JR.
Product Liability Advisory Council, Inc.
1850 Centennial Park Dr., Suite 510
Reston, VA 20191-1517
(703) 264-5300

JONATHAN M. HOFFMAN
Counsel of Record
JOAN L. VOLPERT
Martin Bischoff Templeton Langslet & Hoffman, LLP
888 S.W. Fifth Ave., Suite 900
Portland, OR 97204
(503) 224-3113
Attorneys for Amicus Curiae Product Liability Advisory Council

October 7, 2011

Library of ... Law ...

TABLE OF CONTENTS

IDENTITY AND INTEREST OF THE AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. The Court in *Napier* Correctly Held that Congress Intended Field Preemption When It Enacted the LIA 4

A. The Framers Themselves Recognized the Dominant Federal Interest in the Regulation of Interstate Transportation 5

B. The Nation's History Predating the LIA Confirmed the Dominant Federal Interest in An Integrated System of Interstate Transportation 8

II. Congress Implemented the Dominant Federal Interest by Comprehensively Regulating the Railroads 12

III. This Court's Jurisprudence Prior to and Contemporaneous With Enactment of the LIA Also Recognized the Dominant Federal Interest 17

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

Bibb v. Navajo Freight Lines, Inc.,
359 U.S. 520 (1959) 2

Cannon v. University of Chicago,
441 U.S. 677 (1979) 5

Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co,
237 U.S. 597 (1915) 22

Chicago, Rock Island & Pacific Ry. Co. v. Hardwick Farmers' Elevator Co.,
226 U.S. 426 (1913) 22

City of Burbank v. Lockheed Air Terminal Inc.,
411 U.S. 624 (1973) 2, 3

County of Mobile v. Kimball,
102 U. S. 691 (1880) 21

Gibbons v. Ogden,
22 U.S. 1 (1824) 6, 7, 8, 19

Gloucester Ferry Co. v. Pennsylvania,
114 U. S. 196 (1885) 21

Hall v. DeCuir,
95 U.S. 485 (1877) 19

Hughes v. Oklahoma,
441 U.S. 322 (1979) 2, 6

Merck & Co., Inc. v. Reynolds,
130 S. Ct. 1784 (2010) 24

Miles v. Apex Marine Corp.,
498 U.S. 19 (1990) 5

Munn v. Illinois,
94 U.S. 113 (1876) 18

Napier v. Atlantic Coast Line R. Co.,
272 U.S. 605 (1926) ..... passim

Nashville, C. & St. L. Ry. Co. v. Alabama,
128 U.S. 96 (1888) 22

New York Cent. Ry. Co. v. Winfield,
244 U.S. 147 (1917) 23

Northern Pac. Ry. Co. v. State of Washington ex rel. Atkinson,
222 U.S. 370 (1912) 22

Northwest Airlines, Inc. v. Minnesota,
322 U.S. 292 (1944) 3

Pennsylvania R. Co. v. Public Service Comm'n. of Com. of Pennsylvania,
250 U.S. 566 (1919) 23

Pickard v. Pullman Southern Car Co.,
117 U.S. 34 (1886) 21

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 5

South Dakota v. Yankton Sioux Tribe,
522 U.S. 329 (1998) 5

Southern Ry. Co. v. Reid,
222 U.S. 424 (1912) 22

United States v. Locke,
529 U.S. 89 (2000) 2

Wabash, St. L. & P. Ry. Co. v. State of Illinois,
118 U.S. 557 (1886) 18, 19, 20, 21

Welton v. *Missouri*,
91 U. S. 275 (1875) 18

STATUTES AND REGULATIONS

Adamson Act of 1916 17

Boiler Inspection Act (Act of February 17,
1911, ch. 103 § 2, 36 stat 913) 3, 17

Elkins Act of 1903 17

Hepburn Act of 1906 17

Interstate Commerce Act of 1887 17

Locomotive Inspection Act (1915), 49 U.S.C.
§20701, *et seq*.....passim

Mann-Elkins Act of 1910 17

Railroad Valuation Act of 1913..... 17

Safety Appliance Act of 1893 17

CONSTITUTION

U.S. Constitution, Article I, Section 8 .....passim

OTHER AUTHORITIES

Alfred D. Chandler, *The Railroads--The Nation's First Big Business* (1965) 9

Arthur S. Link, *Woodrow Wilson and the Progressive Era: 1910-1917* (1954) 24

Encyclopedia of North American Railroads (William D. Middleton, George M. Smerk, Roberta L. Diehl eds., 2007) .....passim

Gabriel Kolko, *Railroads and Regulation: 1877-1916* (1965) 13

George E. Turner, *Victory Rode the Rails* (1953) 10, 11

Henry Wade Rogers, *The Constitution and the New Federalism*, 188 N. Am. Rev. 321 (1908) 16

Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 Yale L.J. 1017 (1988)..... 16

Philip Allen, *States With Ideas of Their Own*, 190 N. Am. Rev. 515 (1909) 16

Robert C. Black, III, *The Railroads and the Confederacy* (1952) 9

Robert H. Wiebe, *The Search for Order, 1877-1920* (1967) 17

Slason Thompson, *A Short History of American Railways* (1925) 11

Stephen A. Gardbaum, *The Nature Of Preemption*, 79 Cornell L. Rev. (1994) 16

Theodore Roosevelt: An American Mind; A Selection from his Writings (Mario R. DiNunzio ed., 1994) 14, 15, 16

Thomas C. McCraw, *Prophets of Regulation* (1984) 24

William Howard Taft: Essential Writings and Addresses (David H. Burton ed., 2009) 16

Woodrow Wilson, *The States and the Federal Government*, 187 N. Am. Rev. 684 (1908) 16

IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 98 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective derives from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Several hundred of the leading product liability defense attorneys in the country are also sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 850 briefs as *amicus curiae* in both state and federal courts, including at least 88 briefs in this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as an Appendix.[1]

Trains, aircraft, ships and trucks (some of which are manufactured by PLAC members), utilized to transport goods in interstate commerce, are ill-suited to satisfy conflicting design and warnings requirements of each of the fifty states in which they

---

[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* PLAC affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's Office.

may eventually be operated. PLAC has a vital interest in limiting the imposition of inconsistent standards for such products, given the federal government's uniform and comprehensive regulation of design and performance of such products. Avoiding "Balkanization"[2] by state regulation of modes of interstate transportation systems is a recognized purpose of the Commerce Clause. To allow such Balkanization to occur here would have ominous consequences not only for PLAC members and other manufacturers, but also for consumers and the Nation's economy as a whole. The issues raised in this case are therefore analogous to those presented in post-*Napier* decisions, such as *United States v. Locke*, 529 U.S. 89 (2000) (shipbuilding); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (trucking); and *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973) (aviation). In the latter context, the Court made an observation that exemplifies the practical concern over the shortcomings of piecemeal local regulation of these kinds of federally regulated modes of interstate transportation:

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an

---

[2] *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

> elaborate and detailed system of controls.

Id. at 633-34, quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J. concurring).

INTRODUCTION AND SUMMARY OF ARGUMENT

PLAC concurs with Petitioners' assertion that "*Napier* must be understood in its historical context." (Pet. Br. at 40). However, contrary to Petitioners' argument, the historical and legal context strongly demonstrates Congress's intent to preempt the field when it enacted the Boiler Inspection Act ("BIA") and Locomotive Inspection Act ("LIA"), in 1911 and 1915.[3]

The Constitution's Framers recognized the dominant federal interest in interstate commerce. Political battles over the "railroad problem" raged throughout the country for decades following the Civil War until, after the turn of the new century, railroad regulation had become the central issue in the Progressive era. Congress implemented its dominant federal interest by enacting a succession of unprecedented statutes regulating the railroads. A

---

[3]Except where the context otherwise suggests, for brevity the term "LIA" hereafter refers to the BIA enacted in 1911 (Act of Feb. 17, 1911, ch. 103, §2, 36 Stat. 913) and as amended in 1915 (Act of Mar. 4, 1915, ch. 169, §1, 38 Stat. 1192) to broaden the scope of the federal law and the federal regulator's authority over the design and manufacture of locomotives and locomotive equipment. The Act, as amended, is known as the LIA, 49 U.S.C. § 20701 *et seq*. Petitioners adopted the same reference in the Brief for Petitioners at page 4.

major purpose of federal regulation was to establish unified and effective control over the railroads because no one else could do so, let alone without killing the golden goose that had transformed the nation's economy.

By the time that Congress enacted the LIA, the law was settled that such federal legislation preempts state laws and regulations. When the Court decided *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), it understood the historical context of the LIA and correctly held that Congress intended field preemption when it enacted the statute. *Id.* at 613. The Court meant what it said in *Napier* when it held that the preempted field "extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances" (*id.* at 611), and the Petitioners have provided no valid reason to restrict that holding now. Rather, the historical record compels reaffirming what the Court decided in 1926.

ARGUMENT

I. The Court in *Napier* Correctly Held that Congress Intended Field Preemption When It Enacted the LIA.

Petitioners argue that the LIA should not be given broad preemptive effect because *Napier* was decided in an era when the Court routinely accorded preemptive effect to almost all federal enactments, while the Court does not do so today. (Pet. Br. at 40). Petitioners' conclusion does not flow from their premise. The historical context of federal railroad regulation provides powerful evidence that Congress

necessarily understood that, in enacting the LIA, it voided any state law regulation of the same field.

The settled state of the law left no doubt that the preemptive effect of the LIA was expected. *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 351 (1998) ("[W]e assume that Congress is aware of existing law when it passes legislation..."), *quoting Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *see also, Cannon v. University of Chicago,* 441 U.S. 677, 696-697 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

A. The Framers Themselves Recognized the Dominant Federal Interest in the Regulation of Interstate Transportation.

Field preemption arises, among other occasions, whenever the federal interest in a field addressed by a Congressional enactment is so dominant, or the object to be attained by the enactment is such, that Congressional intent to exclude state regulation in the same field may be inferred. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Petitioners' argument ignores the federal government's long-standing objective in promoting interstate commerce by removing state-imposed impediments to a unified, federally-regulated national system of transportation. Article I, Section 8 of the U.S. Constitution expressly delegates to Congress the power "[t]o regulate Commerce...among the several States...." In Federalist No. 22, Alexander Hamilton discussed a major shortcoming

of the absence of such a power in the Articles of Confederation, fearing that the nation would be undermined by "interfering and unneighborly regulations of some States" if "a national control" did not restrain them. He cited the problems of the German empire, in which "the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless" because of the "multiplicity of duties" the various princes and states exacted upon merchandise.

It is therefore not surprising that this Court's jurisprudence on the subject begins with *Gibbons v. Ogden*, 22 U.S. 1 (1824), in which the Court rebuffed one state's attempt to re-establish what Hamilton had feared. The Court's subsequent decisions applied field preemption to maritime navigation, then railroads and, more recently aviation and trucking. While the modes of interstate transportation have changed markedly over our history, our Founders' policy priority of unified national regulation of interstate commerce remains. *See Hughes*, 441 U.S. at 325 (noting that the Framers held the "conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation").

In *Gibbons*, the Court invalidated New York's intrastate steamboat monopoly on the ground that a federal coasting license issued pursuant to the federal Navigation Act preempted the conflicting state statutes and authorized Gibbons to enter New York waters to conduct interstate trade. Chief

Justice Marshall declared that Congress's power over interstate commerce reached into the interior of each state, empowering Congress to regulate those activities within a state that "affect the states generally." 22 U.S. at 195. Only the "completely internal commerce of a State" was beyond Congress's constitutional authority. *Id.* More importantly, Marshall declared that the commerce power was "plenary" (22 U.S. at 197); it was "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." 22 U.S. at 196. In fact, Marshall declared that the power over commerce "is vested in Congress as absolutely as it would be in a single government." 22 U.S. at 197.

Justice Johnson's concurring opinion noted that "commerce" included not only the exchange of goods and the means of transportation, but also shipbuilding; i.e., the instruments of transportation:

> Ship building, the carrying trade, and propagation of seamen are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects, would not possess power to regulate commerce. That such was the understanding of the framers of the constitution, is conspicuous from provisions contained in that instrument.

22 U.S. at 230.

The *Gibbons* Court recognized that a core purpose of the Commerce Clause was to protect such navigation from conflicting demands of state governments. It is difficult to imagine how the

United States could have become a leading world economic power had the *Gibbons* Court upheld New York's monopoly on intrastate shipping on navigable waterways, let alone had the Court subsequently failed to apply similar principles to state regulation of other modes of federally-regulated interstate transportation systems, such as the railroad, aviation, trucking, and maritime shipping systems.

B. The Nation's History Predating the LIA Confirmed the Dominant Federal Interest in An Integrated System of Interstate Transportation.

The federal government played a pivotal role in fostering a transportation revolution in the late nineteenth and early twentieth centuries. The imperative of protecting interstate commerce, as reflected in *Gibbons*, was magnified exponentially as the railroads transformed the Nation's economy in the ensuing century, producing an unprecedented mix of rapid economic development, coupled with the rise of corporations too large for any one locality or state to regulate effectively without causing disruption in other localities, states, or the Nation as a whole.

Railroads revolutionized transportation during the century between *Gibbons* and *Napier*. They eclipsed shipping as the principal mechanism of interstate commerce and transformed the fabric of American commerce itself. While the Constitution created a climate of free trade across the original thirteen states, geographic constraints initially limited such trade to coastal commerce between the

major ports. *Encyclopedia of North American Railroads,* 2 (William D. Middleton, George M. Smerk, Roberta L. Diehl eds., 2007) (hereafter "*Encyclopedia*").

For the first three decades of the Nineteenth Century, the federal government worked to develop a wider system of turnpikes and canals. *Encyclopedia, supra,* 2-4. Even as late as the mid-1840s, "natural waterways still carried the lion's share of American commerce, and sails remained the primary mover of goods and passengers over any extended distances, as they had been since the days of Greece and Rome." Alfred D. Chandler, *The Railroads--The Nation's First Big Business* 3 (1965).

The railway system expanded rapidly, stimulated by the federal government's reduction on the tariff for iron and grants of land to the railroads as an incentive for expansion. The increased regularity, speed, and volume of transportation "profoundly affected the American farmer, merchant and manufacturer during the decade before the Civil War" (*id.* at 8), and made possible the swift rise of the factory in the United States." *Id.* at 8-9.

The burgeoning rail industry not only played a vital role in the Union's victory over the Confederacy, but the nation also learned important lessons from the Civil War about the need for uniformity and systemization for a national transportation system to succeed. Southern railroads were handicapped by lack of systemization. *Encyclopedia, supra,* 7. "It should not be imagined that anything approaching standardization or interchangeability of parts existed. Cylinder measurements, the size of drivers,

boiler diameter, dimensions of firebox, gross weight, all were subject to a good deal of variation." Robert C. Black, III, *The Railroads and the Confederacy* 16 (1952). A typical southern railroad before the war was "far less of a railroad enterprise than a port developer." George E. Turner, *Victory Rode the Rails* 29 (1953). The railroads "did not constitute parts of a rail system." *Id.* The railroads were "built in the interest of rival port cities, so that connections with other railroads were carefully avoided rather than sought." *Id.* at 29-30. In other words, the transportation system of the South suffered from a form of Balkanization loosely analogous to what Hamilton described in Federalist No. 22, with parochial advantages seized at the expense of successful interstate commerce.

In 1862, Congress chartered the first transcontinental rail route, from Council Bluffs, Iowa, to Sacramento. The railroads became a major national industry--and a transformational force in American commerce--in large measure because of federal land grants and subsidies. Following the war, rail transportation in the United States mushroomed from 30,000 miles of rail lines in 1860 to over 400,000 miles by 1920. *Encyclopedia, supra,* 6-7; 1132 (Table 1). By 1871, the federal government had granted 175 million acres of lands to the railroads (of which 35 million acres were later returned). *Id.* at 6-7. Land grants represented only 20,000 miles of track but "gave impetus to the construction of thousands of miles of line... attracted private investment and encouraged construction across vast, virtually empty lands, especially west of the Mississippi River." *Id.* In addition to the

expansion of the rail system itself, the quantity of locomotives increased exponentially, almost quadrupling between 1876 and 1920. *Id.* at 1133 (Figure 2). By 1914, "the United States had become the industrial leader of the world as a consequence of this transportation revolution." *Id.* at 1.

A key element in the revolutionary transformation of America's transportation system was unprecedented uniformity of the design of the critical components of the rail system. Standardized track gauges enabled railroad cars to be exchanged nationally. *Id.* at 8. "Interchanging traffic meant uniform couplers, brakes, bills of lading, and classification of products." By 1883, the railroad industry had adopted "standardized time zones or 'Railroad Time'... which became the unofficial national time system." *Encyclopedia, supra,* 8; *see also,* John H. White, Jr., "*Technology and Operating Practice in the Nineteenth Century,*" in *Encyclopedia, supra,* 37-52.

The Interstate Commerce Commission ("ICC"), established in 1887, played a vital role in requiring standardization in ways that improved both the safety and the efficiency of rail transport. One example occurred early in the ICC's history, when the Commission became aware of the necessity for a new device to replace the "link and pin" system used to couple railroad cars, because the old system had caused numerous fatalities, and was clumsy and slow. Slason Thompson, *A Short History of American Railways* 235-236 (1925). In the early 1880s, several states had passed laws requiring the use of automatic couplers, but the lack of uniformity in the states' rules had increased, rather than reduced

coupling accidents. *Id.* at 236. The ICC reported in 1890 that most passenger cars, but less than ten percent of freight cars, had been equipped with automatic couplers. *Id.* at 238. Then, in 1893, Congress adopted the Safety Appliance Act which required all carriers engaged in interstate commerce to equip their cars with automatic couplers and their locomotives with driving wheel brakes (*id.*), and by 1900 the ICC reported that compliance had been achieved. *Id.* at 239. As discussed below, standardization of economic and safety rules became a focal point of many of this Court's decisions in which varying state rules, however well-intentioned, came into conflict with the federal interest in uniformity and were therefore held to be invalid.

II. Congress Implemented the Dominant Federal Interest by Comprehensively Regulating the Railroads.

A major premise of Petitioners' argument is that this case involves none of the "uniquely federal areas of regulation...recognized in this Court's preemption jurisprudence...." Pet. Br. at 19, n. 17. During the nearly four decades before the Court's decision in *Napier*, Congress enacted comprehensive federal regulation of the railroads. It did so precisely because the federal government was the only institution capable of adequately regulating what has become a unified national transportation system. Extensive national debate occurred over regulation of the railroads and other large corporations from the Granger movement through the Progressive era. A succession of federal statutes between 1887 and World War I gave the federal government

comprehensive control that prevented inconsistent economic and safety regulation of the railroads by state and local authorities.

Increased federal involvement and restrictions on inconsistent state regulation helped the railroads become the Nation's first "big business" and ultimately, following establishment of the ICC in 1887, the Nation's first regulated industry. *Encyclopedia, supra,* 5-14.. As the railroads grew and consolidated, state legislatures and commissions "were inadequate to deal with the national transportation problem" (*Short History of American Railways, supra,* 240), as the "bulk of the traffic became more and more interstate in its character and more difficult for the states to handle without undue partiality." *Id.*

Progressive-era Presidents Theodore Roosevelt and Taft, as well as the railroad industry, supported comprehensive federal regulation of the railroads as an antidote to inconsistent and parochial regulation by the states that discriminated against out-of-state merchants and manufacturers. Gabriel Kolko, *Railroads and Regulation: 1877-1916,* at 164-165 (1965). President Roosevelt believed that the best way to avoid the dangers of "ill-directed agitation" in the states was to "confer upon the national Government full power to act." *Id.* at 166. In his view, only the federal government could provide unified, effective control. *Id.* at 166-168.

The economic and safety regulatory controls imposed on the railroad industry during the Progressive era, including the LIA, were premised on the presumption that federal regulation would be

exclusive. President Theodore Roosevelt forcefully argued for such comprehensive federal regulation--to the exclusion of the states--in his Eighth Annual Message in December 1908. He stated:

> The chief reason, among the many sound and compelling reasons, that led to the formation of the National Government was the absolute need that the Union, and not the several States, should deal with interstate and foreign commerce; and the power to deal with interstate commerce was granted absolutely and plenarily to the central government and was exercised completely as regards the only instruments of interstate commerce known in those days--the waterways, the highroads, as well as the partnerships of individuals who then conducted all of what business there was. Interstate commerce is now chiefly conducted by railroads; and the great corporation has supplanted the mass of small partnerships or individuals. The proposal to make the National Government supreme over, and therefore to give it complete control over, the railroads and other instruments of interstate commerce is merely a proposal to carry out to the letter one of the prime purposes, if not the prime purpose, for which the Constitution was founded. It does not represent centralization. It represents

merely the acknowledgment of the patent fact that centralization has already come in business. If this irresponsible outside business power is to be controlled in the interest of the general public it can only be controlled in one way--by giving adequate power of control to the one sovereignty capable of exercising such power--the National Government. Forty or fifty separate state governments cannot exercise that power over corporations doing business in most or all of them; first, because they absolutely lack the authority to deal with interstate business in any form; and second, because of the inevitable conflict of authority sure to arise in the effort to enforce different kinds of State regulation, often inconsistent with one another and sometimes oppressive in themselves. Such divided authority cannot regulate commerce with wisdom and effect. The central government is the only power which, without oppression, can nevertheless thoroughly and adequately control and supervise the large corporations. To abandon the effort for national control means to abandon the effort for all adequate control and yet to render likely continual bursts of action by State legislatures, which cannot achieve the purpose sought for, but which can do a great deal of damage to

> the corporation without conferring any real benefit on the public.

Theodore Roosevelt: An American Mind; A Selection from his Writings 134-135 (Mario R. DiNunzio ed., 1994).

His successor (and later Chief Justice) William Howard Taft shared similar views, observing that a "great increase in the volume of Federal jurisdiction" had arisen because, with the inventions of steam navigation and the construction of the railroads, "the interstate commerce of the country has increased from one-fourth of the entire country's commerce to three-fourths of it." *William Howard Taft: Essential Writings and Addresses* 366 (David H. Burton ed.), (2009). Taft also extolled the broad range of federal legislation enacted under his predecessors for the protection and interest of labor concerning railroads engaged in interstate commerce, including the Safety Appliance Act. *Id.* Much of the academic literature during this period reflected the perception that uniform regulation, especially (but not only) of the railroads, had become a national necessity. *See,* Stephen A. Gardbaum, *The Nature Of Preemption*, 79 Cornell L. Rev. 767, 801, n 162 (1994), *citing* Woodrow Wilson, *The States and the Federal Government*, 187 N. Am. Rev. 684 (1908); Henry Wade Rogers, *The Constitution and the New Federalism*, 188 N. Am. Rev. 321 (1908); Philip Allen, *States With Ideas of Their Own*, 190 N. Am. Rev. 515 (1909); *see* Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 Yale L.J. 1017 (1988).

It was in this context that Congress enacted the succession of statutes imposing economic and safety regulation on the railroads. The Interstate Commerce Act of 1887 was followed by the Safety Appliance Act (1893), the Elkins Act of 1903 (outlawing rebates), and the Hepburn Act of 1906 (authorizing the ICC to establish maximum rates and thereby making the ICC a "substantial regulatory agency." Robert H. Wiebe, *The Search for Order, 1877-1920,* at 192 (1967)). This legislation was followed by FELA (1908); the Mann-Elkins Act of 1910 (placing a higher burden of proof for higher rates on the carriers); the Boiler Inspection Act (1911); the Railroad Valuation Act of 1913; the Locomotive Inspection Act (1915); and the Adamson Act of 1916 (8-hour day for railroad workers). *See* Pet. Br. at 3-5; *Encyclopedia, supra,* 13-14. For the reasons explained below, no federal lawmaker could have reasonably expected that the LIA (or any of these laws, for that matter) would not displace state laws in the same fields.

III. This Court's Jurisprudence Prior to and Contemporaneous With Enactment of the LIA Also Recognized the Dominant Federal Interest.

In the four decades before Congress enacted the LIA, the U.S. Supreme Court consistently held that federal regulation of interstate transportation would render any state regulation on the same subject void. Contrary to Petitioners' assertion that the LIA "does not reflect a clear and manifest Congressional intent to displace state-law claims" (Pet. Br. at 31), the preemptive effect of federal

regulation was settled law decades before the LIA's enactment. The so-called "Granger cases," most notably *Munn v. Illinois*, 94 U.S. 113 (1876), upheld state laws that attempted to counteract the high prices charged by the railroads via the grain elevators (often owned by the railroads) by enacting state laws regulating freight and warehousing charges that could be imposed within the state. The Court concluded that the warehouses, whose business was carried on entirely within one state, could, in the absence of federal legislation, be regulated by the state "*until Congress acts in reference to their inter-state relations*, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction." *Id.* at 135 (emphasis added).

Nine years later, in *Wabash, St. L. & P. Ry. Co. v. State of Illinois*, 118 U.S. 557 (1886), the Court held invalid an Illinois law prohibiting long-haul and short-haul clauses in transportation contracts as an infringement on the exclusive powers of Congress granted by the commerce clause. The "very object" of the Commerce Clause, the Court concluded, "'was to insure this uniformity against discriminating state legislation.'" *Id.* at 574, *quoting Welton* v. *Missouri*, 91 U. S. 275, 280 (1875). The Court noted that the regulation at issue purported only to control the carrier when engaged within the state, but that "it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. * * * It was to meet just such a case that the commerce clause in the constitution was adopted." *Id.* at 572-73. The Court

discussed commerce on and along the Mississippi River:

> The River Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers, and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules; and on the other, another. Commerce cannot flourish in the midst of such embarrassments.

Id. at 572, *citing Hall v. DeCuir*, 95 U.S. 485, 489 (1877).

Recalling *Gibbons*, the *Wabash* Court revisited the origins of the Commerce Clause, this time in the context of a country that was now far larger and more mobile, and whose economy was even more

dependent upon a rapid, reliable, and cost-effective system of interstate transportation:

> This clause, giving to congress the power to regulate commerce among the states, and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the constitution. *Cook* v. *Pennsylvania*, 97 U. S. 574; *Brown* v. *Maryland*, 12 Wheat. 446. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states which was deemed essential to a more perfect union by the framers of the constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce.
>
> The argument on this subject can never be better stated than it is by Chief Justice MARSHALL in *Gibbons* v. *Ogden*, 9 Wheat. 195, 196. He there demonstrates that commerce among the states, like commerce with foreign nations, is necessarily a commerce which crosses state lines, and extends into the

> states, and the power of congress to regulate it exists wherever that commerce is found. Speaking of navigation as an element of commerce, which it is only as a means of transportation, now largely superseded by railroads, he says: "The power of congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with commerce with foreign nations, or among the several states, or with the Indian tribes."

118 U.S. at 573. The Court cited a line of cases reiterating the vital importance, as expressed in the commerce clause, of "one system of rules" or "uniformity of regulation" governing interstate, as well as international commerce.[4] *Id.* at 574-575. Shortly after *Wabash*, in upholding a state law requiring vision standards to prevent color-blind people or others with poor vision from serving on railroad lines in any capacity requiring such visual acuity, the Court specifically noted that Congress had plenary power over the issue and that if Congress enacted a rule, "such legislation will supersede any state action on the subject."

---

[4] *County of Mobile v. Kimball*, 102 U. S. 691, 702 (1880) ("For the regulation of commerce...there can be only one system of rules."); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203 (1885) ("[T]he commerce with foreign nations and between the states...is a subject of national character, and requires uniformity of regulation."); *Pickard v. Pullman Southern Car Co.*, 117 U.S. 34 (1886).

Nashville, C. & St. L. Ry. Co. v. Alabama, 128 U.S. 96, 99-100. (1888).

The Court reaffirmed these holdings in a series of railroad cases during the decade in which Congress enacted the LIA. In *Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co*, 237 U.S. 597 (1915), the Court disallowed a penalty imposed under state law for a carrier's failure to resolve a property damage claim promptly. Writing for the Court, Justice Holmes rejected as "immaterial" the plaintiff's contention that the state law penalty was "in aid of interstate commerce." *Id.* at 604. "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Id.*; *see also, Northern Pac. Ry. Co. v. State of Washington ex rel. Atkinson*, 222 U.S. 370 (1912) (invalidating Washington's state law penalty for railroad's violation of federal law enacted in 1907 limiting the hours of service of railway employees); *Southern Ry. Co. v. Reid*, 222 U.S. 424, 440 (1912) ("There is scarcely a detail of regulation which is omitted to secure the purpose to which the interstate commerce act is aimed."); *Chicago, Rock Island & Pacific Ry. Co. v. Hardwick Farmers' Elevator Co.*, 226 U.S. 426, 435 (1913) ("[T]he power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this *because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of*

Congress on that subject are supreme."). (Emphasis added). The LIA was enacted in this legal context.

Likewise, in *New York Cent. Ry. Co. v. Winfield*, 244 U.S. 147 (1917), the Court held that the federal workers compensation system for railroad workers preempted a more liberal state system. "Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform, and not change at every state line." *Id.* at 149. Compensation under state law would "disturb...the uniformity which the act is designed to secure." *Id.* at 153. Once Congress had regulated the subject, the state was not free "by way of complement to the legislation of Congress, to prescribe additional regulations...." *Id.*

The Court applied the same principles to federal safety regulation of the railroads. In *Pennsylvania R. Co. v. Public Service Comm'n. of Com. of Pennsylvania*, 250 U.S. 566 (1919), Justice Holmes, writing for the Court, explained the decision to invalidate a state law that, for safety reasons, required the rear rail car on mail or express trains to contain a platform, whereas the ICC required a caboose at the rear that did not have such a platform. Justice Holmes wrote, "The subject matter in this instance is peculiarly one that calls for uniform law and in our opinion regulation by the paramount authority has gone so far that the statute of Pennsylvania cannot impose the additional obligation in issue here." *Id.* at 569.

Given this consistent line of cases, Congressional awareness of the preemptive effect of the LIA when it was enacted should be presumed. The Court normally assumes that, "when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1795 (2010).

Finally, few people would have had a more thorough understanding of the history, meaning, and effect of federal railroad regulation than the author of *Napier*, Justice Lewis Brandeis, one of whose most prominent victories before joining the Court was the *Advance Rate Case* he successfully litigated against the railroads before the ICC (Thomas C. McCraw, *Prophets of Regulation* 91-94 (1984)), and who had also served from 1912 to 1916 as President Wilson's chief economic adviser. Arthur S. Link, *Woodrow Wilson and the Progressive Era: 1910-1917*, p. 68 (1954). Likewise, William Howard Taft, Chief Justice when the Court decided *Napier*, had as President advocated the passage of numerous bills to regulate the railroads. One of the bills he signed into law in 1911 was the BIA.

The historical and jurisprudential context in which the LIA was enacted, and in which *Napier* was decided, compels the conclusion that *Napier* correctly determined that Congress intended to preempt the field and that the preempted field "extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." 272 U.S. at 611. *Napier's* field preemption holding is grounded in: (1) the federal government's paramount constitutional authority of the regulation of the channels and instruments of

state commerce; (2) the historic growth of the integrated rail transportation system from 1876-1920 and the contribution of uniform standards of design and manufacture to that growth; (3) the varied state responses to that growth; and (4) federal legislative and regulatory action in response to the growth of transportation and the diverse state regulations. Petitioners' arguments seeking to narrow the scope of preemption of the LIA should be rejected.

CONCLUSION

Amicus PLAC respectfully asserts that the decision of the Third Circuit should be affirmed.

Respectfully submitted,

HUGH F. YOUNG, JR.
Product Liability
Advisory Council, Inc.
1850 Centennial Park
Dr., Suite 510
Reston, VA 20191-1517
(703) 264-5300

JONATHAN M. HOFFMAN
Counsel of Record
JOAN L. VOLPERT
Martin Bischoff Templeton
Langslet & Hoffman, LLP
888 S.W. Fifth Ave., Suite 900
Portland, OR 97204
(503) 224-3113
Attorneys for Amicus Curiae
Product Liability Advisory
Council

APPENDIX

APPENDIX
Corporate Members of the Product Liability Advisory Council
as of 8/24/2011
Total: 98

3M
Altec Industries
Altria Client Services Inc.
American Airlines
Arai Helmet, Ltd.
Astec Industries
Bayer Corporation
Beretta U.S.A. Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products, Inc.
BP America Inc.
Bridgestone Americas, Inc.
Brown-Forman Corporation
Caterpillar Inc.
Chrysler Group LLC
Cirrus Design Corporation
Continental Tire the Americas LLC
Cooper Tire and Rubber Company
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. duPont de Nemours and Company
Emerson Electric Co.

Engineered Controls International, Inc.
Environmental Solutions Group
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Lincoln Electric Company
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation

Mitsubishi Motors North America, Inc.
Mueller Water Products
Mutual Pharmaceutical Company, Inc.
Navistar, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pella Corporation
Pfizer Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Techtronic Industries North America, Inc.
Thor Industries, Inc.
TK Holdings Inc.
The Toro Company
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-879

Supreme Court, U.S.
FILED
AUG 19 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GLORIA GAIL KURNS, Executrix of the Estate of George M. Corson, Deceased, and FREIDA E. JUNG CORSON, Widow in her own right,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION and VIAD CORP.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF AMICUS CURIAE PUBLIC JUSTICE, P.C. IN SUPPORT OF PETITIONERS

BRENT M. ROSENTHAL
Counsel of Record
ROSENTHAL PENNINGTON LLP
6116 N. Central Expy.
Suite 301
Dallas, Texas 75206
(214) 453-2500
brosenthal@rpattorneys.com

LESLIE A. BRUECKNER
PUBLIC JUSTICE, P.C.
555 12th St., Suite 1620
Oakland, California 94607
(510) 622-8150

MELANIE HIRSCH
PUBLIC JUSTICE, P.C.
1825 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 797-8600

Attorneys for Amicus Curiae Public Justice, P.C.

August 19, 2011

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Even if the LIA Preempts Positive Provisions of State Law Such as Statutes or Regulations Governing the Safety of Locomotives and Locomotive Equipment, the LIA Does Not Preempt Tort Claims Based on General State Common Law 3

II. The Application of State Common-Law Tort Rules to Claims Based on Defects in Products Used in the Repair and Maintenance of Railroads Does Not Impair Any Federal Interest in Uniformity Served by the LIA 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Bates v. Dow AgroSciences LLC,
544 U.S. 431 (2005) 6, 9, 10, 14

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 6, 7

English v. General Electric Co.,
496 U.S. 72 (1990) 6

Freightliner Corp. v. Myrick,
514 U.S. 280 (1995) 14

Goodyear Atomic Corp. v. Miller,
486 U.S. 174 (1988) 5, 6

Kurns v. A.W. Chesterton, Inc.,
620 F.3d 392 (3d Cir. 2010) 4, 12, 13

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 7, 8

Napier v. Atlantic Coast Line Railroad Co.,
272 U.S. 605 (1926) 3, 4

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984) 4, 5, 8, 14

Sprietsma v. Mercury Marine,
537 U.S. 51 (2002) 3, 8, 9, 14, 15

Wyeth v. Levine,
129 S. Ct. 1187 (2009) 14

TABLE OF AUTHORITIES – Continued

Page

STATUTES

7 U.S.C. §§ 136 *et seq.* 10

21 U.S.C. § 360k(a) 7, 8

46 U.S.C. §§ 4301 *et seq.* 9

49 U.S.C. § 20106(a)(2) 15

49 U.S.C. §§ 20701 *et seq.* ..... *passim*

OTHER AUTHORITIES

Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U.L. REV. 559 (1997) 11

Christina E. Wells, William E. Marcantel & Dave Winters, *Preemption of Tort Lawsuits: The Regulatory Paradigm in the Roberts Court*, 40 STETSON L. REV. 793 (2011) 6, 11

IDENTITY AND INTEREST OF AMICUS CURIAE

Public Justice, P.C., respectfully submits this brief as amicus curiae. Letters of blanket consent of the parties to the filing of amicus curiae briefs have been filed with the Court.[1]

Public Justice is a national public interest law firm dedicated to pursuing justice for the victims of corporate and government abuses. Through involvement in precedent-setting and socially significant litigation, Public Justice seeks to ensure that tort law fully serves its dual purposes of compensating those injured by wrongful conduct and deterring similar conduct in the future. Public Justice is gravely concerned that, if the tort system is limited excessively through an improper application of fundamental preemption principles, neither of these purposes will be served. Specifically, Public Justice files this brief (1) to expand on the argument, made in the Brief for Petitioners at 38-40, that while pervasive federal regulation of a field may preempt positive state law, it cannot serve as a basis for depriving tort victims of their state common-law remedies; and (2) to rebut the contention that an interest in national uniformity of

---

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Public Justice discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Public Justice, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

rules governing railroad safety supports the preemption of state tort claims.

SUMMARY OF ARGUMENT

The Third Circuit held that the by occupying the entire field of safety standards for railroad equipment, the Locomotive Inspection Act (LIA), 49 U.S.C. §§ 20701 *et seq.*, preempts all state law in the area, including state tort law. In so holding, the lower court misapprehended the distinction, repeatedly recognized by this Court, between state enactments of positive law, such as statutes and regulations, and state common-law tort rules. The two types of law differ in purpose as well as in form. The objective of positive law is to proscribe or mandate conduct on a prospective basis. State tort rules, on the other hand, are retrospective and remedial; their primary purpose is to compensate victims for personal harm. Although state tort rules may have an indirect regulatory effect by disincentivizing negligent or otherwise undesirable conduct, compliance with them is not affirmatively required; a prospective defendant in a tort case may choose to absorb the cost of liability rather than modifying its conduct to comply with the state common-law standard. Thus this Court has repeatedly held that a decision by Congress to occupy the entire field of safety regulation in a particular area by no means indicates an intent also to preempt state tort claims in the regulated field.

The Third Circuit also erred in ascribing excessive importance to the federal interest in uniformity of regulation of railroad equipment. There is no evidence or indication that application of state tort rules would impede the system of regulation intended by Congress and established in the LIA, and other federal laws governing the operation of railroads expressly contemplate supplemental state regulation. Moreover, as this Court stated in *Sprietsma v. Mercury Marine*, 537 U.S. 51, 71 (2002), "concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families" and that serve the federal law's "more prominent objective" of promoting safety. The Third Circuit's expressed concern for uniformity does not support its finding that the LIA preempts the state tort rules applicable to petitioners' claims.

ARGUMENT

I. Even if the LIA Preempts Positive Provisions of State Law Such as Statutes or Regulations Governing the Safety of Locomotives and Locomotive Equipment, the LIA Does Not Preempt Tort Claims Based on General State Common Law.

The Third Circuit relied primarily on *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926), for its conclusion that, by occupying the field of regulating locomotives and locomotive parts used in interstate commerce, the LIA preempts tort claims

concerning those products based on state common law. *Kurns v. A.W. Chesterton, Inc.*, 620 F.3d 392, 396-99 (3d Cir. 2010). *Napier* only held, however, that the LIA preempts "state legislation" in this field; it did not consider whether the LIA displaces general rules of state tort law. *Napier*, 272 U.S. at 207. Although this Court has recognized that the application of common-law tort rules can have an indirect regulatory effect, it has repeatedly recognized a distinction between positive law – statutes, regulations, or standards affirmatively adopted by states, which are enforced prospectively and are mandatory – and state common law, which is retrospective and serves a compensatory as well as a deterrent function.

A review of this Court's recent preemption jurisprudence helps to illuminate this distinction. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), this Court held that state tort law survived the federal occupation of the entire field of safety in the nuclear industry. The Court in that case upheld an award of punitive damages to the estate of a laboratory technician who had become contaminated with plutonium while working in a plant that manufactured plutonium rods for use in nuclear power plants. The Court noted that the plant was regulated by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act, and that the Act prohibited "the states from regulating the safety aspects of nuclear development." *Id.* at 250. But the Court found no conflict between federal occupation of the field of

nuclear safety and the enforcement of an award of punitive damages based on a violation of state law. The Court acknowledged "tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability," but concluded that "Congress intended to stand by both concepts and to tolerate whatever tension there was between them." *Id.* at 256.

In *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), the Court again recognized that federal occupation of a field does not necessarily prevent the enforcement of personal remedies authorized by state law. There, the Court allowed a worker in a federally owned nuclear plant to claim enhanced damages under a state worker's compensation statute for injuries the worker sustained as a result of the company's violation of a state safety standard. The Court acknowledged that the plant was "shielded from direct state regulation," but found that the federal law regulating nuclear plants did not bar the worker's pursuit of his state-authorized remedy. *Id.* at 180. Distinguishing positive state enactments from general remedial law, the Court reasoned that the "effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects" of a provision enhancing a worker's compensation award upon proof that breach of a safety regulation caused the injury. *Id.* at 185. Unlike a state regulation, the enhancement provision did not compel particular conduct; the

employer could "choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation." *Id.* at 185-86. The Court concluded that "Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not." *Id.* at 186.

Similarly, in *English v. General Electric Co.*, 496 U.S. 72 (1990), the Court permitted the assertion of a whistleblower's common law tort claim against her employer, a producer of nuclear fuel, arising from her discharge allegedly in retaliation for her complaints about unsafe practices, even though the federal government indisputably occupied the entire field of nuclear safety concerns. The Court noted that the tort claim might have an effect on safety practices, but found the possible effects "neither direct nor substantial enough to place petitioner's claim in the preempted field." *Id.* at 85.

It was not until the Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), that the Court ruled that a federal law precluded the enforcement of state common-law remedies for a tortiously inflicted injury.[2] In its plurality opinion in *Cipollone*,

---

[2] *See Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 441 (2005) ("only after 1992" following the Court's decision in *Cipollone* did "a groundswell of federal and state decisions" emerge holding that federal law preempted state common law tort claims); *see also* Christina E. Wells, William E. Marcantel & Dave Winters, *Preemption of Tort Lawsuits: The Regulatory*

(Continued on following page)

the Court held that a federal provision prohibiting any local "regulation or prohibition" on cigarette advertising in addition to the federal standard barred tort claims as well as "positive enactments by states and localities." *Id.* at 521. But in so holding, the Court focused on the intent of Congress as evidenced by the "plain words" of the federal act. *Id.* Far from suggesting that preemption of state tort law accompanies preemption of local positive law as a matter of course, the Court emphasized that "there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions." *Id.* at 518. Thus, the Court recognized that while state tort law can influence behavior prospectively, its primary function – compensation of tort victims by shifting of the cost of injury to the tortfeasors who could spread the cost among the beneficiaries of its conduct – might justify preservation of state-law tort claims even when state positive law is preempted.

The distinction between positive law and state tort claims persisted in the Court's jurisprudence after *Cipollone*. In *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), the manufacturer of a pacemaker that failed and caused injury claimed immunity from state tort liability under a provision of the Medical Device Amendments (MDA), 21 U.S.C. § 360k(a), that

---

Paradigm in the Roberts Court, 40 STETSON L. REV. 793, 806 (2011).

prohibited states from establishing or continuing in effect any "requirement" different from that in the statute. The manufacturer argued that because its device had been approved for marketing by the Food and Drug Administration (FDA) pursuant to the MDA, the imposition of tort liability would improperly subject the manufacturer to a different state "requirement." A plurality of the Court characterized the manufacturer's claim of express statutory preemption as "not only unpersuasive" but "implausible." *Id.* at 487. The Court found it "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct, and it would take language much plainer than [that in the MDA] to convince us Congress intended that result." *Id.* at 487 (quoting *Silkwood*, 464 U.S. at 251). In a concurring opinion, Justice Breyer added that ordinary principles of field preemption led to the same result, finding no "indication that either Congress or the FDA intended the relevant FDA regulations to occupy entirely any relevant field." 518 U.S. at 508 (Breyer, J., concurring). Although *Medtronic* involves primarily express preemption and not field preemption, the Court's recognition that federal regulation could coexist with state tort law even while preempting state positive law indicates that the distinction between positive and common law remains viable.

The Court's continuing distinction in preemption cases between positive law and state common law is most visible in its unanimous opinion in *Sprietsma v.*

Mercury Marine, 537 U.S. 51 (2002). In *Sprietsma*, the plaintiff's decedent died when she fell out of a recreational boat and was struck by the boat's propeller. The plaintiff sued the boat manufacturer, claiming that the absence of a propeller guard rendered the boat defective under state law. The manufacturer argued that Federal Boat Safety Act (FBSA), 46 U.S.C. §§ 4301 *et seq.*, preempted the plaintiff's tort claim, pointing out that the United States Coast Guard had affirmatively decided not to require propeller guards. The Court rejected the argument and allowed the tort claim. Conceding that the FBSA "might be interpreted as expressly occupying the field with respect to *state positive laws and regulations*," the Court found that the FBSA's "structure and framework do not convey a clear and manifest intent to go even further and implicitly pre-empt all state common law relating to boat manufacture." *Id.* at 69 (emphasis added; internal quotation marks and citation omitted). The Court acknowledged that Congress enacted the FBSA to establish "national construction and performance standards for boats and associated equipment," *id.* at 57, but found that "the concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families. . . ." *Id.* at 70.

Most recently, the Court noted the difference between a federal statute's preemptive effect on positive law and its effect on common law in *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005). In *Bates*,

the Court considered whether peanut farmers whose crops had been damaged by a herbicide could bring tort claims against the herbicide's manufacturer based on common law theories of failure to warn and defective design, among others, notwithstanding the preemption provision in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq*. The statute provided that a state "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." *Id.* at 439 (quoting 7 U.S.C. § 136v(b)). The Court observed that the prohibitions in the statute "apply only to 'requirements,'" and reasoned that the deterrent effect achieved by the application of tort law is not a "requirement." 544 U.S. at 443. A requirement, the Court continued, "is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement." *Id.* at 446. None of the common-law rules invoked by the plaintiffs, the Court noted, "requires that manufacturers label or package their products in any particular way." *Id.* at 444. Although the statute prohibits application of "any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations," the provision does not "preempt any state rules that are fully consistent with federal requirements." *Id.* at 452.

The Court's distinction between the preemptive effect of federal law on state positive law on the one

hand and general common law on the other makes perfect sense. As one commentator has noted, "[p]ositive enactments, such as statutes or regulations, involve general and prospective rules establishing standards of conduct." Christina E. Wells, William E. Marcantel & Dave Winters, *Preemption of Tort Lawsuits: The Regulatory Paradigm in the Roberts Court*, 40 STETSON L. REV. 793, 802 (2011). In contrast, "tort law derives from adjudication involving individuals in retrospective and personal dispute resolution processes," and thus does not establish any generalized standards for future conduct. *Id.* And, unlike state statutes or regulations, tort law serves a compensatory as well as a deterrent function. When the application of state law would directly conflict with a federal standard or objective, the state interest in providing compensation to injury victims must yield. But when application of state tort law would not conflict with any federal rule or interest, and would merely operate in a field subject to extensive federal regulation, there is no basis for overriding the state's interest in applying its own common-law tort system to compensate injury victims and deter misconduct. As one commentator has written, "[o]ur system of federalism demands that interference with states' policy decisions to give their citizens tort remedies should be the product of judgment and careful balancing, rather than an unintended result of congressional inaction or imprecision." Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U.L. REV. 559, 627 (1997).

In short, this Court has repeatedly recognized – and for good reason – that state court claims do not have the same regulatory effect as state positive law. This Court has also recognized that tort claims further the states' strong interest in compensating injury victims through the tort system. For these reasons, a decision by Congress to occupy the entire field of state positive law by no means indicates an intention to also preempt state tort claims in the regulated field. Especially in a case like this one, where the relevant statutory language is so sparse and nonspecific, there is no reason to infer a congressional intent to immunize defendants from liability under state tort rules that do not conflict with any federal regulation.

II. The Application of State Common-Law Tort Rules to Claims Based on Defects in Products Used in the Repair and Maintenance of Railroads Does Not Impair Any Federal Interest in Uniformity Served by the LIA.

Nor could it be reasonably argued that allowing state tort claims in the particular "field" at issue would impair any congressional interest in uniformity. The lower court suggested that allowance of state common-law tort claims against suppliers of railroad equipment would impede "Congress's goal of uniform railroad equipment regulation" served by the LIA. *Kurns*, 620 F.3d at 398. But the Third Circuit cited nothing to indicate that Congress intended to restrict tort remedies, as well as affirmative state requirements, in the interest of uniformity. The Third Circuit

also expressed concern that were states allowed to apply their own common law to claims for injuries caused by railroad equipment, "equipment would have to be designed so that it could be changed to fit these standards as the trains crossed state lines, or adhere to the standard of the most restrictive states." *Id.* Based in part on these concerns, the lower court reasoned that Congress must have intended to preempt state tort claims, even though it did not say so.

This reasoning was in error. First, as petitioners explain throughout their brief, the LIA applies only to locomotives in operation on railroad lines. Pet. Br. 21-28, 34-35. The hypothetical posited by the Third Circuit, that state tort claims such as petitioners' would inflict a patchwork of differing common-law standards of care on suppliers of railroad equipment used in interstate commerce, would never actually occur, because such a train would be "in use" and covered by the LIA. It is only when the train is under repair, in a single location, that local tort rules govern the safety of railroad parts.

Second, the possibility of differing standards applying to product design is common to all nationally marketed products, and is inherent in our system of federalism. Surely the interest in maintaining coherent standards for the safety of equipment used to repair railroads is no more compelling than those for the safety of commercial trucks (whose use also inevitably involves crossing state lines), pharmaceuticals, pesticides, nuclear fuel, or any other product

subject to federal regulation. Yet this Court has not preempted claims based on defects in these products under appropriate circumstances. *See, e.g.*, *Freightliner Corp. v. Myrick*, 514 U.S. 280, 290 (1995) (commercial trucks); *Wyeth v. Levine*, 129 S. Ct. 1187, 1203 (2009) (prescription drugs); *Bates*, 544 U.S. at 452-53 (pesticides); *Silkwood*, 464 U.S. at 258 (nuclear power).

In *Bates*, as in this case, the pesticide manufacturer argued that allowing tort suits based on defects covered by federal labeling regulations would undermine the uniformity that the regulations were designed to promote. The Court found the concerns about the prospect of inconsistent results under state law to be greatly overstated. 544 U.S. at 451. The Court acknowledged that "properly instructed juries might on occasion reach contrary conclusions on a similar issue of misbranding," but noted that "there is no reason to think such occurrences would be frequent or that they would result in difficulties beyond those regularly experienced by manufacturers of other products that every day bear the risk of conflicting jury verdicts." *Id.* at 452.

Moreover, as the Court explained in *Sprietsma v. Mercury Marine*, even when Congress expressly identifies "uniformity" as a goal of a federal law, "this interest is not unyielding." 537 U.S. at 70. Absent an express prohibition of state tort claims, "concern with uniformity does not justify the displacement of state common-law remedies," when those remedies serve

the law's "more prominent objective" of promoting safety. *Id.* at 71.

Finally, other federal statutes governing railroad operations belie the contention that there is an unyielding federal need for uniform, nationwide standards applicable to all aspects of railroad safety. The Federal Railroad Safety Act, for example, provides that laws, regulations, and orders related to railroad security "shall be nationally uniform *to the extent practicable*." 49 U.S.C. § 20106(a)(2) (emphasis added). It further provides that a state "may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security" when such a law is necessary to eliminate a hazard, does not conflict with federal law, and does not unreasonably burden interstate commerce. *Id.* Thus in the exact area at issue here, Congress has expressly tolerated the sort of "nonuniformity" that the lower court saw as a reason to find petitioners' tort claims preempted.

In short, the risk of nonuniform standards of care posed by state tort law does not provide any justification for implying field preemption of state tort claims via the LIA. This is not to say, of course, that Congress cannot expressly preempt state tort law relating to the safety of railroad equipment should it choose to do so. It merely belies the argument that in the absence of such an express preemption provision, Congress's intent to preempt state law claims can be

implied based on a compelling need for uniformity in laws governing railroad safety.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

BRENT M. ROSENTHAL
Counsel of Record
ROSENTHAL PENNINGTON LLP
6116 N. Central Expy.
Suite 301
Dallas, Texas 75206
(214) 453-2500
brosenthal@rpattorneys.com

LESLIE A. BRUECKNER
PUBLIC JUSTICE, P.C.
555 12th St., Suite 1620
Oakland, California 94607
(510) 622-8150

MELANIE HIRSCH
PUBLIC JUSTICE, P.C.
1825 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 797-8600

Attorneys for Amicus Curiae
Public Justice, P.C.

August 19, 2011

AMICUS CURIAE BRIEF

RECORD
A-9
PRESS

Supreme Court, U.S.
FILED
AUG 19 2011
OFFICE OF THE CLERK

No. 10-879

IN THE
Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, WIDOW IN HER OWN RIGHT,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORP. AND VIAD CORP,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF PUBLIC LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ART SADIN

SADIN LAW FIRM, P.C.
121 Magnolia, Suite 102
Friendswood, TX 77546
281-648-7711

ERNEST A. YOUNG
Counsel of Record
203 Strolling Way
Durham, NC 27708
919-360-7718
(young@law.duke.edu)
Counsel for Amici

August 19, 2011

Library of Congress
Law Library

QUESTION PRESENTED

Whether the Locomotive Inspection Act preempts the field of state common-law claims against manufacturers of locomotives and locomotive parts by workers injured in railroad maintenance facilities.

CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. This Court's decision in *Napier* is inconsistent with this Court's contemporary approach to preemption. 6

A. *Napier* failed to require clear evidence of Congress's intent to preempt the field. 8

B. Subsequent decisions applying *Napier* have failed to respect Congress's intent to preserve a role for state law in the field of railroad safety. 12

C. The Third Circuit's interpretation of *Napier* is inconsistent with Congress's and this Court's contemporary approach to preemption in fields regulated by federal administrative agencies. 18

D. *Napier* applied only to positive state regulation, but subsequent decisions have ignored the important distinction between such regulation and state common law claims. 21

E. *Napier*, as interpreted by subsequent lower court decisions, is an artifact of an earlier era of

preemption jurisprudence and should be reconsidered.....25

II. Broad notions of implied field preemption are inconsistent with the proper understanding of our federal structure.....29

A. Broad implied field preemption is inconsistent with the original understanding of the Supremacy Clause.....30

B. Broad implied field preemption undermines the political and procedural safeguards of federalism.....32

Conclusion.....36

TABLE OF AUTHORITIES

Cases

Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942).....8

Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005).....22, 24

Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997).....29

Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011).....11, 12

De Canas v. Bica, 424 U.S. 351 (1976).....11

Egelhoff v. Egelhoff, 532 U.S. 141 (2001).....29

English v. General Elec. Co., 496 U.S. 72 (1990).....22

Exxon Corp. v. Maryland, 437 U.S. 117 (1978).....31

Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963) 8
Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528 (1985) 33
Geier v. American Honda Motor Co., 529 U.S. 861 (2000) 15
Gregory v. Ashcroft, 501 U.S. 452 (1992) 33
Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985)10, 13, 18, 20
Hines v. Davidowitz, 312 U.S. 52 (1941) 11
Kurns v. A.W. Chesterton, Inc., 620 F.3d 392 (3rd Cir. 2010) ..... passim
Law v. General Motors Corp., 114 F.3d 908 (9th Cir. 1996) 16, 22
Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 20
Mintz v. Baldwin, 289 U.S. 346 (1933) 7
Napier v. Atlantic Coast Railway Co., 272 U.S. 605 (1926) ..... passim
New York Dept. of Social Services v. Dublino, 413 U.S. 405 (1973) 10
Pacific Gas & Electric Co. v. State Energy Resources, Conservation, and Development Bd., 461 U.S. 190 (1983) 11
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 17
Planned Parenthood v. Casey, 505 U.S. 833 (1992 26
PLIVA, Inc. v. Mensing, 131 U.S. 2567 (2011) 30
Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 11
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 3, 7
Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 26
San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) 22

Scheiding v. General Motors Corp., 993 P.2d 996 (Cal. 2000) 14
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 23
Southern Railway Co. v. Reid, 222 U.S. 424 (1912) 6
Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) ..... passim
United States v. Locke, 529 U.S. 89 (2000) 11
Williamson v. Mazda Motor of America, Inc., 131 S. Ct. 1131 (2011) 12, 15, 20
Wyeth v. Levine, 129 S. Ct. 1187 (2009) 20, 23, 34

Statutes

Federal Insecticide, Fungicide, & Rodenticide Act, 7 U.S.C. § 136v(a) & (b) 19
Federal Railroad Safety Act, 49 U.S.C. § 20106 ..... 13, 19, 24
National Traffic & Motor Vehicle Safety Act, 49 U.S.C. § 30103(b) 19, 24
Occupational Safety & Health Act, 29 U.S.C. § 653(b)(4) 16

Other Authorities

Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962) 23
Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321 (2001) 5, 34
Brief for the United States as Amicus Curiae, *John Crane Inc. v. Atwell*, No. 10-272 (U.S. filed May 6, 2011) 14
Caleb Nelson, *Preemption*, 86 Va. L. Rev. 231 (2000) 5, 30, 31

Ernest A. Young, *The Story of* Gregory v. Ashcroft: *Clear Statement Rules and the Statutory Constitution of American Federalism*, in William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, eds., Statutory Interpretation Stories 197 (2011)..... 33
Laurence H. Tribe, 1 American Constitutional Law (3d ed. 2000).....4, 6, 8, 34
Note, *A Framework for Preemption Analysis*, 88 Yale L. J. 363 (1978) 6
Policy Statement, Railroad Occupational Safety and Health Standards, 43 Fed. Reg. 10,538 (Mar. 14, 1978) 16
Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer, & David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System (6th ed. 2009)..... 35
Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994).....
.....3, 6, 7, 28
William W. Van Alstyne, *The Second Death of Federalism*, 83 Mich. L. Rev. 1709 (1985) 33

INTEREST OF AMICI

Amici are scholars and teachers in various fields of public law that bear on federal preemption of state law.[1] William Buzbee is Professor of Law at Emory University School of Law, where he teaches and writes about Environmental and Administrative Law and directs the Center on Federalism and Intersystemic Governance. Stephen Gardbaum is the MacArthur Foundation Professor of International Justice and Human Rights at the UCLA School of Law, where he teaches Constitutional Law, Comparative Law, and International Law. Thomas McGarity is the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law at the University of Texas School of Law, where he teaches and writes in the fields of Administrative Law, Environmental Law, and Torts. Nina Mendelson is Professor of Law at the University of Michigan Law School, where she teaches and conducts research in Administrative law, Environmental Law, and Statutory Interpretation. Garrick Pursley is Assistant Professor of Law at the University of Toledo College of Law, where he teaches Constitutional Law and Civil Procedure. David Rubenstein is Associate Professor of Law at Washburn University School of Law, where he teaches Constitutional Law, Administrative Law, and Immigration Law. Wendy Wagner is the Joe E. Worsham Centennial Professor

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

at the University of Texas School of Law, where she teaches Environmental Law and Torts. Ernest Young is the Alston & Bird Professor of Law at Duke Law School, where he teaches Constitutional Law and Federal Courts.

Amici have each written extensively on questions involving the preemption of state law by federal statutes and regulations. We submit this brief as an opportunity to bring our scholarship to bear on questions of public importance facing the Court.

SUMMARY OF ARGUMENT

This case presents the problem of widespread reliance by the lower federal courts and the state courts on one of this Court's precedents that, although an artifact of an outdated jurisprudential era, has never been revisited by this Court. The Third Circuit viewed this case as governed by this Court's decision in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926). *See Kurns v. A.W. Chesterton, Inc.*, 620 F.3d 392, 396-97 (3rd Cir. 2010). We believe that that the Court of Appeals misconstrued *Napier* for the reasons aptly developed in Petitioners' Brief: This case, unlike *Napier*, does not involve locomotives "in use" on a railroad line; this case, unlike *Napier*, involves preemption of state common law claims rather than positive legislation; and this case, unlike *Napier*, involves plaintiffs with no remedy under the Federal Employees Liability Act (FELA) or any other federal regulatory scheme. These distinctions are sufficient to reverse the Third Circuit and resolve the case in Petitioners' favor.

As scholars, however, our interest is in the broader implications for preemption doctrine of extending *Napier*'s broad approach to implied field preemption to contemporary preemption litigation. Preemption doctrine has changed fundamentally since *Napier* was decided in 1926, in response to this Court's expanding view of Congress's regulatory jurisdiction, the development of the national administrative state, and changing patterns of federal regulatory statutes. This court decided *Napier* in an era in which Congress's jurisdiction was more circumscribed than it is today and federal regulation less common, but courts interpreted what regulation Congress *did* promulgate as virtually automatically preempting the relevant field. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 801-05 (1994). After the dramatic expansion of Congress's jurisdiction that accompanied the New Deal, this Court adopted a far more cautious approach to preemption. It abandoned the rule of automatic field preemption and established the rule against finding preemption of state law "unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see generally* Gardbaum, 79 Cornell L. Rev. at 806-07.

Napier's interpretation of the Boiler Inspection Act (BIA) as preempting the entire field of railroad equipment safety—despite the absence of express preemptive language in the statute, the statute's lack of comprehensive substantive provisions, and the enforcing agency's similar decision *not* to promulgate a comprehensive set of regulations—reflect the earlier era's strong presumption of field preemption. In the modern era,

by contrast, "the Court has emphasized that . . . federal occupation of a field will not be lightly inferred." Laurence H. Tribe, 1 American Constitutional Law § 6-31, at 1205 (3d ed. 2000). Until now, however, this Court has not revisited the issue. And in the interim, subsequent extensions of *Napier* by the lower federal courts and most of the state supreme courts have only exacerbated the dissonance between the Court's 1926 opinion and contemporary preemption doctrine.

That dissonance renders *Napier* ripe for reconsideration. Congress has already taken the crucial steps by repeatedly amending the original BIA to incorporate it within a broader scheme of federal railway safety regulation—the Federal Railroad Safety Act—that *expressly* preserves an extensive role for state law. All that remains is for this Court to recognize the effect of these statutory changes; *Napier* has no *stare decisis* force when Congress has amended the relevant statutes to incorporate express provisions delineating the scope of federal preemption and saving a role for state law.

More broadly, *Napier*'s legacy in the lower courts illustrates the general problems with doctrines of implied field preemption. This is not a case in which courts have implied preemption of the field from the presence of pervasive substantive federal regulation; rather, the courts have inferred that the mere *delegation* of regulatory authority to a federal agency itself foreclosed all state regulation. This extraordinarily broad form of implied field preemption contravenes the best interpretation of the Supremacy Clause's text, which warrants preemption "only if state law contradicts a valid rule

established by federal law." Caleb Nelson, *Preemption*, 86 Va. L. Rev. 231, 231 (2000). Here, neither Congress nor the administering agency has articulated a federal rule on asbestos in locomotives, much less indicated that state law be exempted from the regulatory field

Implied field preemption also undermines contemporary federalism jurisprudence, which relies primarily on the political representation of the States in Congress and the procedural difficulty of enacting federal law to limit federal incursions on state authority. *See generally* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321 (2001). Eliminating all state authority in a field of regulation simply because Congress has delegated authority to an agency to act—in the absence of either explicit congressional statements on preemption or preemptive action by the agency—radically undermines this arrangement and threatens to alter the generally interstitial character of federal law. Field preemption, in our view, generally should occur only where Congress has affirmatively stated its intent to exclude state regulation and defined the boundaries of the preempted field. At a minimum, a mere delegation of authority to an agency, without more, should never be sufficient to preempt all state activity in a field of regulation.

ARGUMENT

I. This Court's decision in *Napier* is inconsistent with this Court's contemporary approach to preemption.

Preemption jurisprudence in 1926, when this Court decided *Napier v. Atlantic Coast Railway Co.*, 272 U.S. 605 (1926), was considerably different than it is today. As Stephen Gardbaum has explained, during the first third of the Twentieth Century "[p]reemption was an automatic consequence of congressional action in a given field. There was no systematic reference to congressional intent as the necessary trigger for preemption; rather, where the states and Congress had concurrent power, 'that of the State [was] superseded when the power of Congress [over interstate commerce was] exercised.'" Gardbaum, 79 Cornell L. Rev. at 801 (quoting *Southern Railway Co. v. Reid*, 222 U.S. 424, 436 (1912)).[2] Justice Brandeis's opinion in *Napier* did prefigure the post-New Deal era by stating that "[t]he intention of Congress to exclude States from exerting their police power must be clearly manifested." 272 U.S. at 611. Nonetheless, the

---

[2] *See also* Tribe, *supra*, § 6-30, at 1195 (observing that in the first part of the Twentieth Century, "when the federal government regulated a given subject, any state law which purported to govern the same area was invalid. It mattered not whether there was an inescapable conflict . . . or whether the state law simply duplicated, or went further than, the federal law."); Note, *A Framework for Preemption Analysis*, 88 Yale L. J. 363, 375-76 (1978) ("Prior to the 1930s . . . the Court followed the doctrine that national and state regulation were mutually exclusive: once Congress regulated a subject, the states could not regulate it.").

actual holding of the case—as well as much of its rhetoric—reflects the rule of automatic field preemption that characterized the pre-New Deal period. The Court announced a broad principle of field preemption based not on statutory text but on the fact that "the power delegated to the Commission by the Boiler Inspection Act . . . is a general one." *Id.* at 611. And it said that "[t]he fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power." *Id.* at 613.

Beginning roughly a decade after *Napier*, this Court's preemption doctrine changed in response to the expansion of federal regulatory authority in the wake of the New Deal. As Professor Gardbaum has demonstrated, cases like *Mintz v. Baldwin*, 289 U.S. 346 (1933), and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), reflected a more cautious approach to preemption; after all, combining the new and broader scope of federal regulation with the old rule of automatic field preemption upon federal entry into an area would have left little room for state law.. *See* Gardbaum, 79 Cornell L. Rev. at 806-07. The pattern of congressional legislation similarly changed, with Congress both regulating more broadly in many different fields and making clear that such regulation was not meant to foreclose state activity. As we discuss below, the evolution of the federal railroad safety regime, which includes the Locomotive Inspection Act (LIA), dramatically reflected these changes.

Napier thus stands as an anachronism within both the general corpus of preemption jurisprudence

and the broader railroad safety regime. And lower court decisions have exacerbated the problem by expanding *Napier* to cover repair and maintenance shops, risks that the federal agency has chosen not to regulate, and state common law claims. As a result, this Court should either hold *Napier* inapplicable or overrule it in light of intervening changes in the law.

A. *Napier* failed to require clear evidence of Congress's intent to preempt the field.

This Court has rejected the pre-New Deal presumption of automatic field preemption whenever Congress regulates in a particular area. Not only did the post-New Deal Court adopt a general presumption against preemption, but it has been even more cautious about field preemption in particular. According to Professor Tribe, "[t]he reluctance to find complete federal preemption is somewhat stronger than with more particularized preemption claims . . . and comports with the basic conception of federal law as interstitial in nature." Tribe, *supraError! Bookmark not defined.*, § 6-31, at 1205 n.2. As the Court explained in *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963), "[t]he principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[3]

---

[3] *See also Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (stating

The form of field preemption announced in *Napier* and applied by the Third Circuit in the present case is "implied" in two distinct senses. First, and most obviously, Congress said nothing in the original BIA at all about preemption—"field," "conflict," or otherwise. But the second aspect is equally significant: While field preemption is sometimes inferred from the pervasiveness of a federal regulatory scheme, *Napier* disavowed any such argument. The BIA itself established only a general requirement that locomotives be "in proper condition and safe to operate," 272 U.S. at 608; authority to establish particular requirements was delegated to the ICC. Moreover, in response to the petitioner's argument that the ICC had not established many such requirements, the Court said "this, if true, is not of legal significance. . . . The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power." 272 U.S. at 612-13. *Napier*'s broad principle of field preemption thus rested purely on implication from the federal statute's broad delegation of regulatory authority—not from any substantive requirements in the Act itself or from the pervasiveness of agency regulation pursuant to that Act.

It would be highly surprising for a court to reach a similar conclusion under current field preemption doctrine. This Court has been reluctant

---

that in areas not involving foreign affairs, "[w]e will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States" by preempting an entire field of regulation).

to infer field preemption even from a comprehensive set of substantive statutory requirements. In *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 415 (1973), for example, the Court stated that "[the] subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." Likewise, in *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717 (1985), this Court explained that "[w]e are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive." "Such a rule," the Court emphasized, "would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence." *Id.*

Given these precedents, how much more reluctant to infer field preemption should courts be where neither the statute nor the agency has promulgated comprehensive substantive requirements? In *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), the Court considered an argument that federal law preempted the field of boating safety to the extent that a decision by the Coast Guard not to regulate propeller guards preempted state common law claims. The Court rejected this argument, suggesting that field preemption would

only exist if the federal statute *required* the agency to issue comprehensive regulations. *See id.* at 68-69. In so holding, the Court contrasted the pleasure boating safety regime with the far more comprehensive regime governing oil tanker safety, under which the Coast Guard *was* required to regulate comprehensively. *See id.* (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), and *United States v. Locke*, 529 U.S. 89 (2000) (both finding field preemption)). Comparing the statutory regime for locomotive safety with these modern instances of field preemption highlights the dissonance between *Napier*'s approach to preemption and current doctrine.

Moreover, even when the Court *has* construed federal statutes as preempting a particular regulatory field, it has defined the field narrowly. For example, *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941), recognized field preemption in immigration law, but subsequent cases have made clear that this field preemption is limited to matters of entry, registration, and the like, and does not preempt the states' customary police power over matters of employment. *See Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1974-75 (2011); *De Canas v. Bica*, 424 U.S. 351, 356-60 (1976). Likewise, this Court has recognized that federal law preempts the field of nuclear power plant safety, but leaves questions of the economic viability of nuclear utility plants to state regulators. *Pacific Gas & Electric Co. v. State Energy Resources, Conservation, and Development Bd.*, 461 U.S. 190, 205-08 (1983).

This general caution toward field preemption has not been limited to the jurisprudence of this

Court. As the reach of federal law expanded after the New Deal, Congress increasingly wrote or amended statutes to expressly save a role for state law. Hence, this Court has had occasion to construe express savings clauses in a number of recent cases, including *Whiting*, in which the federal Immigration Reform and Control Act saved a role for state licensing laws, *see* 131 S. Ct. at 1977-78 (construing 8 U.S.C. § 1324a(h)(2)), and *Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131 (2011), in which the National Traffic and Motor Vehicle Safety Act saved from preemption claims under state common law, *see id.* at 1135 (construing—but declining to rely upon—15 U.S.C. § 1397(k)). These statutes—and the scores like them throughout the United States Code—demonstrate that in an age of pervasive federal regulation, even detailed federal statutory schemes are not necessarily meant to foreclose concurrent state regulatory activity. *Napier* proceeded against a decidedly different historical backdrop giving rise to decidedly different assumptions about the structure of federal regulation.

B. Subsequent decisions applying *Napier* have failed to respect Congress's intent to preserve a role for state law in the field of railroad safety.

The general statutory scheme at issue in this case—the Federal Railroad Safety Act—reflects this legislative trend toward preserving state law. As Petitioners' brief recounts in more detail, Congress has amended the original BIA construed in *Napier*, and it has incorporated the BIA/LIA statute into a

broader regulatory scheme that expressly saves a significant role for state law. Whether or not the savings clause of the Federal Railroad Safety Act (FRSA) directly govern this case, Congress's action plainly demonstrates that Congress no longer—if it ever did—views railroad safety as a field requiring exclusively federal regulation.

Specifically, the FRSA added to the statute 49 U.S.C. § 20106, which articulates detailed rules for preemption in this area that the Third Circuit—like the other modern courts that have relied on *Napier*—virtually ignored. Subsection (a)(1) states that "[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable." But Subsection (a)(2) immediately qualifies this principle by stating that "[a] State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." In particular, "[a] State may adopt or continue in force an additional or more stringent law, regulation, or order . . . when [it] . . . (A) is necessary to eliminate or reduce an essential local safety or security hazard; (B) is not incompatible with a law, regulation, or order of the United States Government; and (C) does not unreasonably burden interstate commerce." The FRSA then adds subsection (b), specifically entitled "Clarification regarding State law causes of action," which provides that "[n]othing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party . . . has failed to comply with a

State law, regulation, or order that is not incompatible with subsection (a)(2)."

Whether or not this language directly governs the present case is a matter of some dispute. Relying heavily on legislative history, the United States has argued for an implicit limitation on the scope of the FRSA. Brief for the United States as Amicus Curiae, *John Crane Inc. v. Atwell*, No. 10-272, at 19-20 (U.S. filed May 6, 2011). This reading would render the LIA an anomaly within the broader scheme of federal railroad safety regulation; indeed, it seems likely that courts might have to apply different preemption rules to claims arising in different parts of the same train. But even if one accepts the Government's argument, the FRSA makes clear that the assumptions upon which *Napier* rested—that when Congress delegates authority to a federal agency, it means to preempt all state regulation in the field, and that Congress will not tolerate non-uniform requirements for trains moving in interstate commerce—no longer hold true, if they ever did.

In any event, the Third Circuit made no effort even to construe this express statutory language or to explain why it did not govern the preemption inquiry. It simply noted that "the express purpose of the FRSA was to maintain broad federal regulatory authority and ensure nationwide uniformity of locomotive standards" and concluded that "*Napier* compels a holding of preemption." 620 F.3d at 400-01.[4] This amounts to substituting a court's view of

---

[4] For a similar example of wooden adherence to an extremely broad reading of *Napier*, *see Scheiding v. General Motors Corp.*, 993 P.2d 996, 1002-03 (Cal. 2000) ("It is also immaterial to our analysis that plaintiffs' causes of action raise no conflict with

the statute's general purpose for what Congress actually said in the text. Although this Court has occasionally held that conflict preemption can occur even for state law claims that fall within a textual savings clause, *see Geier v. American Honda Motor Co.*, 529 U.S. 861, 874 (2000), it has done so only where there was strong evidence that particular state requirements directly contravened specific and important federal policies articulated by the agency charged with administering the statute. *See Williamson*, 131 S. Ct. at 1136-37.

That is hardly the case here. As Petitioners have explained, the Federal Railroad Administration—the agency currently charged with administering the LIA—has declined to issue rules on asbestos in locomotives, not because it believes asbestos to be non-hazardous or because it wishes to deny remedies to those injured by it, but because it found that railroad manufacturers have largely ceased using asbestos. *See* Petitioners' Brief at 47-48. Because the FRA believes its jurisdiction is limited to locomotives *in use*, it had no occasion to consider whether claims like Petitioners' should be preempted. *See id.* Even more significant, the FRA has not undertaken to regulate rail repair and maintenance facilities, like the one in which Mr. Corson was injured. Rather, it has left these facilities to the Occupational Safety and Health Administration, which regulates under a regime that specifically preserves state-law claims. *See* Policy

---

any provision of the BIA or its implementing regulations, that they will not impair nationwide uniformity, or that they are consistent with the safety purposes underlying the BIA.") (citing *Napier*).

Statement, Railroad Occupational Safety and Health Standards, 43 Fed. Reg. 10,538, 10,585 (Mar. 14, 1978); 29 U.S.C. § 653(b)(4). This is therefore a case in which the relevant federal regulatory authorities have defined the boundaries of the preemptive field, such as it is, in a way that plainly excludes Petitioners' claims.

Given the weakness of the statutory case for field preemption, it is hard not to conclude that contemporary courts finding field preemption in Locomotive Inspection Act cases have in fact been driven by simple policy concerns. In this case, the Third Circuit worried that "[i]f each state had its own standards for liability for railroad manufacturers, equipment would have to be designed so that it could be changed to fit these standards as the trains crossed state lines, or adhere to the standard of the most restrictive states." 620 F.3d at 398.[5] Contemporary courts have thus interpreted *Napier* to establish a strong imperative of uniformity matters of railroad safety, then interpreted the preempted field to extend to any state law that might impair that uniformity.

This argument may well be a dormant Commerce Clause argument in disguise: Any risk of disparate state requirements might impose a burden on interstate commerce. The disguise is necessary, of course, because dormant Commerce Clause scrutiny is generally deferential to state interests in

---

[5] *See also Law v. General Motors Corp.*, 114 F.3d 908, 911-12 (9th Cir. 1996) (speculating that "[i]mposing tort liability on railroad equipment manufacturers would . . . forc[e] them to conform to design and construction standards imposed by the states.").

the absence of discrimination against out-of-staters. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is *clearly excessive in relation to the putative local benefits*.") (emphasis added). The same sort of burden argument, moreover, might be made against state tort remedies against manufacturers of cars and trucks, or any other good that is used in multiple jurisdictions.

In any event, this Court has made clear that these sorts of generic uniformity arguments are not a universal solvent. In *Sprietsma*, for example, the Court rejected a similar argument about boating safety. There, the Court said that the interest in uniformity "is not unyielding. . . . Absent a contrary decision by the Coast Guard, the concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the Act's more prominent objective, emphasized by its title, of promoting boating safety." 537 U.S. at 70. The FRSA's plain language similarly makes clear that the federal interest in uniformity can yield to state requirements that do not contravene federal regulations.[6]

---

[6] Ironically, even Justice Brandeis's opinion in *Napier* concluded with the observation that "the rules to be prescribed [by the Commission] . . . need not be uniform throughout the United States; or at all seasons; or for all classes of service." 272 U.S. at 613. *Napier* thus inferred preemption from the nature of Congress's decision to delegate authority to the

C. The Third Circuit's interpretation of *Napier* is inconsistent with Congress's and this Court's contemporary approach to preemption in fields regulated by federal administrative agencies.

Napier inferred a blanket rule of field preemption from Congress's decision to delegate broad authority to the ICC. *See* 272 U.S. at 613 ("[T]he broad scope of the authority conferred upon the Commission leads to that conclusion" that "the Boiler Inspection Act . . . was intended to occupy the field."). Such delegations were rare in 1926, when *Napier* was decided. They are rare no longer, and neither Congress nor the courts now assumes that a federal agency exercising broad delegated authority must preempt all state regulation in the same field. *See, e.g.*, *Sprietsma*, 537 U.S. at 68-69; *Hillsborough County*, 471 U.S. at 717. This Court, moreover, generally has deferred to the views of federal agencies when they determine that particular aspects of state regulation are *not* preempted by federal law.

Contemporary statutes frequently delegate broad authority to federal agencies while nonetheless preserving a role for state law. These statutes typically preempt state law only where the federal agency has acted to regulate a particular product or activity. The preemption provisions of the National

---

agency, viewed through the lens of preemption principles prevailing at the time. The strong policy argument for uniform requirements on railroad manufacturers is largely a creation of subsequent decisions.

Traffic and Motor Vehicle Safety Act, for example, apply only "[w]hen a motor vehicle safety standard is in effect under this chapter" and preempt state law only to the extent that it diverges from that standard. 49 U.S.C. § 30103(b). Similarly, the Federal Insecticide, Fungicide, and Rodenticide Act preempts state law only with respect to pesticides that are federally registered, and its strict uniformity requirement is limited to matters of labeling or packaging. 7 U.S.C. § 136v(a) & (b). The Act further provides that "[a] State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this Act and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator." *Id.* § 136v(c)(1). Similar arrangements occur throughout the United States Code. It would be incongruous to treat statues like this as the *Napier* court treated the Boiler Inspection Act—that is, to infer broad field preemption from the mere fact of delegation. And the Court's contemporary cases have not done so.

Federal railroad safety regulation, as reflected in the FRSA, now has much the same structure. As explained in the preceding section, 49 U.S.C. § 20106(a)(2) provides that "[a] State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." Here, of course, the Secretary has issued no orders governing either the safety of repair facilities or the hazards of asbestos. Applying *Napier*'s rule of blanket field preemption to this

amended statutory scheme would not only read the FRSA amendments out of the statute but also render the LIA an anachronism. As the FRSA amendments reflect, the structure of modern federal regulation typically reserves a role for state regulation alongside delegations of authority to federal agencies.

A second feature of contemporary preemption jurisprudence is that when federal agencies disavow preemption, their views have typically received some deference from the courts. *See, e.g.*, *Williamson*, 131 S. Ct. at 1139; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 498-99 (1996); *Hillsborough Cty.*, 471 U.S. at 721.[7] Here, the Solicitor General has argued that "the LIA does not authorize the FRA to regulate hazards posed by the repair process," United States brief *Atwell, supra*, at 15, thereby limiting the scope of any field preempted under that statute. At a minimum, contemporary preemption jurisprudence counsels deference to this limited reading of the scope of preemption.

---

[7] When federal agencies assert that state law *is* preempted, of course, they effectively expand their own power at the expense of the States. In such cases, agency views on preemption have encountered considerably greater judicial skepticism. *See, e.g.*, *Wyeth v. Levine*, 129 S. Ct. 1187, 1201-03 (2009).

D. *Napier* applied only to positive state regulation, but subsequent decisions have ignored the important distinction between such regulation and state common law claims.

Napier itself involved a Georgia statute requiring locomotives to have "an automatic door to the firebox" and a Wisconsin staute "which prescribes a cab curtain." 272 U.S. at 607. As Justice Brandeis explained, "[i]n Georgia, the details of the device were prescribed by the legislature. In Wisconsin, the specifications were prescribed by an order of the state Railroad Commission." *Id.* Neither the Georgia nor the Wisconsin litigation involved private claims seeking compensation for personal injury; rather, "[i]n each case, an interstate carrier sought to enjoin state officials from enfocing, in respect to locomotives used on its lines, a state law which prohibits use within the State of locomotives not equipped with the device prescribed." *Id.* State legislatures and executive officials were thus engaged in precisely the same governmental function with respect to railroad safety as Congress and the ICC: Establishing specific technical requirements of general applicability and enforcing them against regulated entities through traditional executive mechanisms. *Napier* thus held that Congress had entrusted this regulatory function exclusively the ICC. While we believe that this holding was itself overbroad, we also believe that this is *all* that *Napier* held.

Over time, however, lower courts construing *Napier* have extended its broad doctrine of implied

field preemption to cover common law claims. *See, e.g., Law*, 114 F.3d at 910-11. The Third Circuit followed that trend in the present case, invoking the Ninth Circuit's earlier conclusion that "[t]he [LIA] preempts any state action that would affect the 'design, the construction, and the material' of locomotives." 620 F.3d at 398 (quoting *Law*, 114 F.3d at 911). In taking this step, however, the lower courts have set aside the important distinction that both Congress's statutes and the decisions of this Court have drawn between state positive law and common law claims. To be sure, common law claims have a regulatory aspect: they establish a standard of care and seek to induce potential defendants to conform to that standard. *See, e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). Nonetheless, neither Congress nor this Court has been willing to equate these distinct forms of regulation. *See, e.g., Sprietsma*, 537 U.S. at 69 ("The [Federal Boating Safety Act] might be interpreted as expressly occupying the field with respect to state positive laws and regulations but its structure and framework do not convey a "clear and manifest" intent . . . to go even further and implicitly pre-empt all state common law relating to boat manufacture.") (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)).

This Court has frequently noted that "common-law claims . . . —unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating accident victims." *Sprietsma*, 537 U.S. at 64. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), for example, recognized that "[t]he long history of tort litigation against manufacturers of

poisonous substances adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly." *Id.* at 449-50 (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984)); *see also Wyeth*, 129 S. Ct. at 1202 (noting the "distinct compensatory function" of state tort law).

Similarly, the Court has recognized that state common law claims can function as a "complementary form of . . . regulation," *Wyeth*, 129 S. Ct. at 1202, by operating as a "back end" check on activity that federal agencies regulate on the front end. Positive regulation at both the federal and state levels operates prospectively, generally trying to identify dangerous products and practices before they are actually put into use. Common law claims, by contrast, afford a retrospective look at the regulated activity; to borrow a phrase from constitutional law, they provide a "sober second thought." Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 25-26 (1962). While this retrospective look may not substitute for prospective analysis, *ex post* litigation may fill in important gaps in that analysis and take into account unexpected consequences of regulated activities. Common law litigation provides valuable incentives that bring additional information to light. As the Court has recognized, the "compensatory function" of tort law "may motivate injured persons to come forward with information" that might not otherwise come to light and "provide incentives for [manufacturers] to disclose safety risks promptly," *Wyeth*, 129 S. Ct. at 1202. Moreover, federal

regulators often have limited resources that often prevent them from monitoring the actual experience under regulations once those regulations are promulgated, *see id.*. (noting that "[t]he FDA has limited resources to monitor the 11,000 drugs on the market" and that such monitoring is particularly difficult "in the postmarketing phase as new risks emerge"). Generally speaking, the "history [of tort litigation against manufacturers] emphasizes the importance of providing an incentive to manufacturers to use the utmost care in the business of distributing inherently dangerous items." Bates, 544 U.S. at 450.

Given the distinct functions of state positive law and common law, Congress often distinguishes between the two in preemption provisions. The National Traffic and Motor Vehicle Safety Act, for example, preempts state "standards" to the extent that they diverge from federal standards promulgated by the Department of Transportation, 49 U.S.C. § 30103(b), but explicitly states that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." *Id.* § 30103(e). Similarly, the FRSA amendments to the federal railroad safety regime explicitly save from preemption "an action under State law seeking damages for personal injury, death, or property damage" as long as they are not substantively incompatible with particular federal regulations. 49 U.S.C. § 20106(b)(1).

The Third Circuit's error in this case was thus twofold: First, even if the LIA had never been amended, it would have been wrong to infer from

Congress's silence on preemption a blanket rule that applied to positive state laws and state common law claims alike. The contemporary pattern of Congress's legislation and this Court's decisions establishes that these two kinds of state regulation serve different functions and Congress frequently intends to treat them differently. Second, the Court of Appeals erred in ignoring the FRSA amendments, which expressly save state causes of action for compensation so long as they do not actually conflict with federal requirements.

E. *Napier*, as interpreted by subsequent lower court decisions, is an artifact of an earlier era of preemption jurisprudence and should be reconsidered.

The Third Circuit acknowledged in this case that *Napier* put it in a difficult spot. Implicitly recognizing the dissonance between *Napier* and contemporary preemption doctrine, the Court of Appeals insisted that "[w]e are of course bound by a direct holding of the Supreme Court of the United States." 620 F.3d at 397 n.6. It explained that "[t]o the extent that the plaintiffs argue that more recent decisions of the Supreme Court imply that the Court may now view this issue differently, we simply note that the Supreme Court has held that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" *Id.* (quoting *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484

(1989)). We do not agree that the lower federal courts were so bound, because Congress had fundamentally amended the Locomotive Inspection Act with respect to preemption between this Court's decision in *Napier* and the present litigation. But it is nonetheless understandable that the lower federal courts (and most state courts) have been unwilling to inter *Napier*'s broad principle of field preemption without more clear guidance from this Court.

To the extent that this Court finds *Napier* out of step with current law on preemption, it might approach that issue in either of two ways. First, it might assume without deciding that *Napier* was correct at the time it was decided and within the scope of what it actually held, but conclude that Congress has eliminated the decision's precedential force by specifically addressing the matter of preemption in subsequent amendments to the statutory scheme. *Napier* was, after all, a case of statutory construction, and interpretations must change when the statute does.

If, on the other hand, the Court chooses to approach *Napier* through its traditional *stare decisis* calculus, our view is that that calculus requires that *Napier* be overruled. This Court has generally considered whether the prior decision established a rule that has proven unworkable, whether there is reliance on the prior rule, and whether the relevant law and factual circumstances have changed in ways that deprive the prior rule of its logic and force. *See Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (plurality opinion). Each of these factors militates in favor of overruling *Napier* in the present case.

Napier's rule has proven unworkable because its boundaries are hopelessly ambiguous. As we have already discussed, the rule of field preemption might have been limited to matters which the federal agency has actually addressed, or to state positive regulation, but the lower courts have extended *Napier* past any of these natural firebreaks. Because *Napier* did not rest on any textual articulation of Congress's preemptive intent in the underlying statute, there were no textual boundaries to constrain its rule of preemption. The lower courts have thus applied *Napier*'s rule whenever state law might apply divergent burdens on railroads and railroad equipment manufacturers. Such freewheeling policy judgments are hardly a recipe for coherence and predictability in the law.

It is unlikely that regulated entities have relied on *Napier*, given its ambiguous scope. An equipment manufacturer, for example, could hardly rely upon field preemption given the ambiguity whether the LIA even applies to manufacturers as well as the language of the FRSA amendments, which seem to roll back the statute's preemptive effect. And courts have only recently applied *Napier* to issues like asbestos, which the FRA has declined to regulate.

The most compelling reason to abandon *Napier*'s rule, however, is the fundamental change in the law of preemption that has occurred since *Napier* was decided in 1926. As we have already discussed, preemption doctrine had to change in recognition of the post-1937 expansion of Congress's Commerce Power. If the pre-New Deal rule of automatic field preemption following upon Congress's entry into a

field had been paired with the post-New Deal expansion of federal regulation, no room for state regulation would have remained. *See* Gardbaum, 79 Cornell L. Rev. at 806-07. Instead, the pre-New Deal preemption rules have been abandoned just as surely as the pre-New Deal doctrines of a narrow Commerce Clause and freedom of contract. But because preemption holdings are generally specific to narrow statutory contexts, this Court has not had occasion to revisit every one of its pre-New Deal automatic field preemption holdings. That is why this case affords an important opportunity to clarify the extent to which preemption doctrine has changed.

Finally, changes in the relevant facts bolster the case for reconsidering *Napier*'s broad rule of implied field preemption. Federal regulation is now commonplace, not exceptional, and federal agencies generally work in tandem with state regulators, with state common law frequently playing a supporting role. The assumption upon which *Napier* relied—that Congress would desire federal regulators to have a clear field in which to operate without interference from state institutions—does not reflect the reality of current regulation. Likewise, the dangers to which railroad workers are exposed have expanded to included types of threats—like asbestos—that were unanticipated by the *Napier* court. As the FRA has concluded, the regulatory regime that *Napier* established is not well suited to addressing long-latent diseases contracted primarily through the repair process that do not directly implicate the safe operation of locomotives. It is not clear, of course, that *Napier* ever meant to address such matters, but the lower courts' wooden extension

of field preemption to unanticipated threats highlights the need for reconsideration.

II. Broad notions of implied field preemption are inconsistent with the proper understanding of our federal structure.

This Court's preemption jurisprudence "has recognized the practical importance of preserving local independence, at retail, i.e., by applying pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute's language and purpose with federalism's need to preserve state autonomy." *Egelhoff v. Egelhoff*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting). Broad notions of implied field preemption are inconsistent with this approach. As Justice Thomas has recognized, "field preemption is itself suspect, at least as applied in the absence of a congressional command that a particular field be pre-empted. . . . [O]ur recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 616-17 (1997) (Thomas, J., dissenting). Implied field preemption is inconsistent, moreover, not only with this Court's preemption doctrine but also with the text of the Constitution and this Court's general approach to federalism. Justice Breyer was correct when he observed that "in today's world . . . the true test of federalist principle may lie . . . in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law." *Egelhoff*, 532 U.S. at 160-61 (Breyer, J., dissenting). It is thus critical to

decide preemption cases with one eye on the broader structure of constitutional federalism. From that perspective, this Court should take an extremely cautious approach to implied field preemption.

A. Broad implied field preemption is inconsistent with the original understanding of the Supremacy Clause.

Caleb Nelson has argued that the text of the Supremacy Clause warrants preemption "only if state law contradicts a valid rule established by federal law," Nelson, 86 Va. L. Rev. at 231—a proposition that rules out not only "obstacle" preemption but also other broad forms of implied preemption. As the plurality recognized in *PLIVA, Inc. v. Mensing*, 131 U.S. 2567 (2011), "[t]he phrase 'any [state law] to the Contrary notwithstanding'" in the Supremacy Clause "is a non obstante provision. Eighteenth-century legislatures used non obstante provisions to specify the degree to which a new statute was meant to repeal older, potentially conflicting statutes in the same field. . . . The non obstante provision in the Supremacy Clause therefore suggests that federal law should be understood to impliedly repeal conflicting state law. *Id.* at 2579-80 (citing Nelson, *supra*, at 234-53). In *Mensing*, Justice Thomas's opinion relied on this point to urge that courts should not strain federal law to avoid preempting—i.e., impliedly repealing—state law. But the even-more-obvious flipside of that argument is that preemption cannot occur in the absence of a logical contradiction between some positive aspect of federal law and state law. As Professor Nelson puts it "[t]he constitutional test for

preemption is thus the same as the traditional test for repeal: Can state and federal law stand together, or do they establish contradictory rules?" 86 Va. L. Rev. at 252.[8]

No such contradiction can be shown here. Congress has neither articulated a federal rule on asbestos in locomotives nor stated that there should

---

[8] Professor Nelson's argument about the original understanding of the Supremacy Clause has been controversial, chiefly because he believes that it forecloses the application of this Court's traditional presumption against preemption. *See* Nelson, 86 Va. L. Rev. at 290-98. But that issue is not before the Court, and accepting Nelson's conclusions about implied preemption need not require abandoning the *Rice* presumption. Nelson argues that "[a] general rule that express preemption clauses should be read 'narrowly,' . . . . is hard to square with the Supremacy Clause's *non obstante* provision." *Id.* at 293. But he admits that "[o]ne should not take this point too far," *id.* at 294, and he accepts that "judges should generally be 'reluctant to infer pre-emption.'" *Id.* at 293 (quoting *Exxon Corp. v. Maryland*, 437 U.S. 117, 132 (1978)). Nelson's argument would foreclose only a presumption far more rigid than this Court has traditionally applied. Moreover, Nelson acknowledges that "[w]hile the *non obstante* provision tells courts not to apply the general presumption against implied repeals in preemption cases, it does not require them to discard their other tools of statutory interpretation." *Id.* at 294. This Court's federalism-based "clear statement" rules and presumption against preemption, which developed long after the period examined by Nelson, are among those "other tools." As we have explained, this Court developed the *Rice* presumption in order to accommodate preemption doctrine to its broad post-New Deal interpretation of Congress's regulatory authority under the Commerce Clause. *Rice*'s presumption, then, has little to do with the older presumption against implied repeals that the Supremacy Clause addressed. That Clause's insistence on a direct conflict between state and federal law, however, has only increased in importance as a result of the same historical changes.

be no state rule, and neither has the agency to whom Congress delegated regulatory authority. As we have already discussed, both the *Napier* court and the lower courts extending *Napier*'s holding have been forthright in ruling out of court any arguments based on Congress's failure to provide for specific substantive standards of locomotive safety or the agency's decision not to issue rules on the particular matters implicated in individual cases. To be sure, Congress might mandate simply that there shall be no state rules in a particular area, and such a mandate would logically contradict any state rules in that field. But *implied* field preemption, where Congress has done no such thing, offers neither a federal jurisdictional rule nor—where the agency has failed to articulate substantive standards—a federal substantive rule for state law to contradict.

The Supremacy Clause, in other words, is not the dormant Commerce Clause. Congress must actually establish rules of federal law—either jurisdictional or substantive—and state law must logically contradict those rules before it is preempted. This requirement is critical not only to respect the Supremacy Clause's text and history, but also to support the broader structure of constitutional federalism established by the Constitution and this Court's cases.

B. Broad implied field preemption undermines the political and procedural safeguards of federalism.

Since 1937, this Court has generally interpreted Congress's enumerated powers broadly and relied upon political and procedural safeguards

to protect state autonomy against federal encroachments. *See Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 550-54 (1985). Some commentators decried *Garcia* as the "second death of federalism,"[9] but subsequent decisions have endeavored to resolve federal statutory cases in ways that render these structural and political safeguards meaningful. In *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1992), for example, this Court explained that "inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."[10] This dynamic has been particularly important in preemption cases. As Laurence Tribe has explained, "[b]y declining to *infer* preemption in the face of congressional ambiguity, the Court . . . [is] furthering the spirit of *Garcia* by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end. . . . [T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to

---

[9] William W. Van Alstyne, *The Second Death of Federalism*, 83 Mich. L. Rev. 1709 (1985).

[10] *See also* Ernest A. Young, *The Story of* Gregory v. Ashcroft: *Clear Statement Rules and the Statutory Constitution of American Federalism*, in William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, eds., Statutory Interpretation Stories 197, 225 (2011) (concluding that "the *Gregory* majority fashioned a doctrinal strategy that turned *Garcia*'s emphasis on the national political process into a meaningful safeguard for state autonomy").

protect states' interests." Tribe, *supra*, § 6-28, at 1175-76.

The political representation of the States in Congress is not the only way in which the federal law-making process protects federalism. Equally important is "the complex set of procedures that Congress and the President must follow to enact 'Laws of the United States.'" *Wyeth*, 129 S. Ct. at 1206-07 (Thomas, J., concurring in the judgment). As Bradford Clark has explained, "[t]he lawmaking procedures prescribed by the Constitution safeguard federalism in an important respect simply by requiring the participation and assent of multiple actors. These procedures make federal law more difficult to adopt by creating a series of 'veto gates.' . . . [T]he imposition of cumbersome federal lawmaking procedures suggests that the Constitution reserves substantive lawmaking power to the states and the people both by limiting the powers assigned to the federal government and by rendering that government frequently incapable of exercising them." Clark, 79 Tex. L. Rev. at 1339-40. As a result, "[t]he Supremacy Clause thus requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures." *Wyeth*, 129 S. Ct. at 1207 (Thomas, J., concurring in the judgment).

This Court should develop its preemption jurisprudence in ways that bolster these political and procedural safeguards of federalism. Writing in 1953, Henry Hart and Herbert Wechsler insisted

that "[f]ederal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. . . . Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation." Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer, & David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 459 (6th ed. 2009) (quoting the first edition). Implied field preemption threatens this traditional relationship more fundamentally than any other form of preemption. And the double form of implication in this case—that is, preemption not only in the absence of any express statement of Congress's preemptive intent, but based on Congress's mere delegation of authority rather than on the substantive provisions of the legislation or regulations actually issued by the agency—is more threatening still. If the interstitial status of federal law is to be altered, it should occur through deliberate action by the States' representatives in Congress, accomplished through the rigorous channels that the Constitution specifies for federal lawmaking.

Conclusion

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Art Sadin
Sadin Law Firm, P.C.
121 Magnolia,
Suite 102
Friendswood,TX 77546
281-648-7711

Ernest A. Young
Counsel of Record
203 Strolling Way
Durham, NC 27708
919-360-7718
(young@law.duke.edu)

August 19, 2011

AMICUS CURIAE BRIEF

No. 10-879

In The
Supreme Court of the United States

GLORIA GAIL KURNS,
EXECUTRIX OF THE STATE OF
GEORGE M. CORSON, DECEASED, ET AL.,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS
CORPORATION AND VIAD CORPORATION,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit**

BRIEF AMICUS CURIAE OF THYSSENKRUPP BUDD COMPANY SUPPORTING THE RESPONDENTS

JOSEPH E. RICHOTTE
Counsel of Record

DANIEL R.W. RUSTMANN
JAMES E. WYNNE
BUTZEL LONG, P.C.
150 West Jefferson Avenue, Suite 100
Detroit, Michigan 48226
(313) 225-7000
richotte@butzel.com

*Attorneys for Amicus Curiae
ThyssenKrupp Budd Company*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The petitioners want to bring State law tort claims against locomotive manufacturers based on locomotive design, construction, and materials. In *Napier v. A. Coast Line R.R. Co.*, 272 U.S. 605 (1926), this Court ruled that Congress had preempted the field of design, construction and material used to build locomotives under the Locomotive Inspection Act. Are the petitioners' State law claims preempted?

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
STATEMENT	2
SUMMARY OF ARGUMENT	7
ARGUMENT	11
A. The intent of the 61st Congress controls, and the 61st Congress intended to preempt the field	11
B. The presumption against preemption does not apply	18
C. The nature of the preempted field requires preemption of State tort actions based on locomotive design, construction, and materials	21
D. Even if the FRSA savings clause applies, the petitioners' claims remain preempted	30
CONCLUSION	36

TABLE OF AUTHORITIES

Page

CASES

A. Coast Line R.R. Co. v. Georgia, 234 U.S. 280 (1914) 17, 18

AT&T v. C. Office Tel., Inc., 524 U.S. 214 (1998) 23

B&O R.R. Co. v. Groeger, 266 U.S. 521 (1925) 9, 21, 22, 23

Crane v. Cedar Rapids & I.C. Ry. Co., 395 U.S. 164 (1969) 26

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) 13, 19, 34

English v. Gen. Elec. Co., 496 U.S. 72 (1990) 22

Finley v. United States, 490 U.S. 545 (1989) 15

Geier v. American Honda Motor Co., 529 U.S. 861 (2000) 27

Gen. Motors Corp. v. Kilgore, 853 So. 2d 171 (Ala. 2002) 27

Gibbons v. Ogden, 22 U.S. 1 (1824) 20

Gilvary v. Cuyahoga Valley Ry. Co., 292 U.S. 57 (1934) 25, 26

Industrial Accident Comm'n v. Payne, 259 U.S. 182 (1922) 24

Lundeen v. Canadian P. Ry. Co., 447 F.3d 606 (8th Cir. 2006) 35

Marshall v. Burlington N., Inc., 720 F.2d 1149 (9th Cir. 1983) 14

TABLE OF AUTHORITIES – Continued

Page

Moore v. Chesapeake & Ohio R.R. Co., 291 U.S. 205 (1934) 26

Napier v. A. Coast Line R.R. Co., 272 U.S. 605 (1926) ..... *passim*

New York C. R.R. Co. v. White, 243 U.S. 188 (1917) 25

Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000) 13, 34

Oglesby v. Delaware & Hudson Ry. Co., 180 F.3d 458 (2d Cir. 1999) 29

Ray v. A. Richfield Co., 435 U.S. 151 (1978) 19

Riegel v. Medtronic, Inc., 552 U.S. 312 (2008) 31, 34

S. Ry. Co. v. Reid, 222 U.S. 424 (1912) 4

Scheiding v. Gen. Motors Corp., 993 P.2d 996 (Ca. 2000) 23, 28

Shanks v. DL&W R.R. Co., 239 U.S. 556 (1916) 25

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 22

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 22

Stewart v. Kahn, 78 U.S. (11 Wall.) 493 (1871) 15

Tex. & Pac. R.R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 23, 24

Theriat v. Hart, 2 Hill. 380 (1842) 15

TABLE OF AUTHORITIES – Continued

Page

Tipton v. Atchinson T&SF Ry. Co., 298 U.S. 141 (1936) 27

Touche Ross & Co. v. Redington, 422 U.S. 560 (1979) 23

United States v. Locke, 529 U.S. 89 (2000) 19

United Transp. Union v. Long Island R.R. Co., 455 U.S. 678 (1982) 2, 19, 20, 21

STATUTES

Boiler Inspection Act
Act of Feb. 17, 1911, ch. 103, 36 Stat. 913 ..... *passim*

California Workers' Compensation Insurance and Safety Act of 1913, 1913 Cal. 176 25

Federal Railroad Safety Act of 1970
Act of Oct. 16, 1970, Pub. L. No. 91-458, § 205, 84 Stat. 972 6

49 U.S.C. § 20102 ..... *passim*

49 U.S.C. § 20106 ..... 33, 34

49 U.S.C. § 20106(a) 35

49 U.S.C. § 20106(a)(2) 31, 32

49 U.S.C. § 20106(b) 31, 32

49 U.S.C. § 20106(b)(1) 34

49 U.S.C. § 20106(b)(1)(A) 33

49 U.S.C. § 20106(b)(1)(B) 33

49 U.S.C. § 20106(b)(1)(C) 33, 34

TABLE OF AUTHORITIES – Continued

Page

49 U.S.C. § 20106(b)(2) 36

49 U.S.C. § 20106(c) 31

Interstate Railroad Rate Act
Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 ..... 19, 20, 24

Locomotive Inspection Act
Act of Mar. 4, 1915, ch. 169, 38 Stat. 1192 ..... *passim*

Act of Jun. 7, 1924, Pub. L. No. 68-277, 43 Stat. 659 12

49 U.S.C. § 20701 ..... 12, 15

Safety Appliance Act
Act of Mar. 2, 1893, ch. 196, 27 Stat. 531 ..... *passim*

Act of Mar. 2, 1903, ch. 976, 32 Stat. 943 20

Act of Apr. 14, 1910, ch. 160, 36 Stat. 298 20

REGULATIONS

49 C.F.R. § 229.5 2

RULES

Supreme Court Rule 37.6 1

TREATISES

Restatement (Third) of Torts: Products Liability § 2 29

TABLE OF AUTHORITIES – Continued

Page

LAW REVIEW ARTICLES

Frank J. Mastro, *Congress Clarifies the Preemptive Effect of the Federal Railroad Safety Act*, The Transp. Lawyer (Oct. 2007) 34

Frank J. Mastro, *Preemption Is Not Dead*, 37 The Transp. L.J. 1 (2010).....35

Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 Yale L.J. 1017 (1988).....19

Stephan A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767 (1994).....4, 18, 19

MISCELLANEOUS

Charles W. McDonald, The *Federal Railroad Safety Program: 100 Years of Safer Railroads* (Fed. R.R. Admin. 1993).....2, 3, 4, 19

LEGISLATIVE MATERIALS

46 Cong. Rec. 2071 (1911) 16

153 Cong. Rec. H3128 (2007) 33

H.R. Conf. Rep. 110-259 (2007).....33

H.R. Rep. No. 68-490 (1924).....16

H.R. Rep. No. 91-114 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104.....13, 14

H.R. Rep. No. 103-180 (1993).....15

H.R. Rep. No. 110-1401 (2007).....33

TABLE OF AUTHORITIES – Continued

Page

S. Doc. No. 61-446 (1911) 16

S. Rep. No. 63-1068 (1915) 16

S. Rep. No. 103-265 (1994) 14

INTEREST OF AMICUS CURIAE

With the consent of the parties, ThyssenKrupp Budd Company (The Budd Company) submits this brief amicus curiae supporting the respondents. Letters of consent have been filed with the Clerk of the Court.[1]

The Budd Company manufactured railroad passenger cars for a number of railroads from the 1930s through the 1980s. It pioneered the concept of a self-propelled passenger railcar, which is simultaneously a locomotive and a passenger car capable of carrying 50-100 passengers. The dual nature of self-propelled railcars provides versatility to railroad carriers. Any railcar can be used as the engine car, with other railcars coupled as additional passenger cars. Thus, on any given day, a railcar crossing a State line could be used as a locomotive, a passenger car, or both. The Budd Company manufactured several versions of these self-propelled railcars from the 1930s into the 1980s. Some remain in service today.

Despite their versatility, federal regulations generally treat self-propelled railcars solely as locomotives.

---

[1] Under Rule 37.6, The Budd Company states that no counsel for a party authored this brief or financially contributed to it in whole or in part. The Budd Company and its members, counsel, and the following insurers financially contributed to the preparation and submission of this brief: Allstate Ins. Co., American Empire Ins. Co., Arrowpoint Capital Corp., Hartford Ins. Co., Liberty Mutual Ins. Co., Nationwide Ins. Co., Resolute Management, Inc., Sentry Ins. Co., and Travelers Ins. Co.

See 49 C.F.R. § 229.5 at *Locomotive* (2). As a locomotive manufacturer, The Budd Company takes great interest in the preemptive effect of the Locomotive Inspection Act (LIA).

STATEMENT

Like our Nation's seaports and airports, the national rail system defines the essence of interstate and foreign commerce. On a daily basis, trains cross State and national borders to deliver passengers and freight to communities and hubs of commerce. The engine of this system – literally and figuratively – is the locomotive.

As this Court observed, it became evident more than a century ago that "a uniform regulatory scheme [was] necessary to the operation of the national rail system." *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 688 (1982). After the Civil War, construction of interstate rail lines began in earnest. Charles W. McDonald, *The Federal Railroad Safety Program: 100 Years of Safer Railroads*, 1 (Fed. R.R. Admin. 1993). By the 1870s, the railroad industry had spanned the continent, having completed the first transcontinental railroad in 1869. *Id.* During these boom years, however, "safety took a back seat to profit and expansion." *Id.* Boilers frequently exploded because of poor maintenance, improper operation, and insufficient inspection. *Id.*

It was not until the mid-1880s that States began passing laws to regulate railroad safety. *Id.* at 6. By the early 1890s, it had become evident that State laws imposed conflicting safety standards that made it impossible for interstate railroads to comply with each State's requirements. *Id.* at 6-7. In 1893, Congress responded with the first Safety Appliance Act (SAA), requiring common carriers engaged in interstate commerce to install automatic couplers and power brakes. Act of Mar. 2, 1893, ch. 196, 27 Stat. 531. Between 1893 and 1910, Congress would amend the SAA twice more to enhance brake safety. During the same time, injuries and fatalities fell by more than 50%. McDonald, *supra* at 10-11.

Building on this success, Congress enacted the Boiler Inspection Act (BIA) in 1911 "to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto." Act of Apr. 14, 1910, ch. 160, 36 Stat. 913. The BIA made it unlawful for common carriers to engage in the interstate movement of goods unless "the boiler of [the] locomotive and appurtenances thereof are in proper condition and safe to operate." *Id.* at § 2. Newly minted federal boiler inspectors were appointed to ensure that boilers were fit for service – that is, they were to ensure that the design and maintenance of the boilers made them "safe to operate." *Id.* at §§ 3-6.

In 1915, Congress expanded the BIA to include inspection of the entire locomotive. Act of Mar. 4,

1915, ch. 169, 38 Stat. 1192. Thus, the BIA became the LIA. During the next 20 years, boiler-related accidents fell by more than 90%. McDonald, *supra*, at 19-20.

The enactment of the SAA, BIA, and LIA coincided with an important shift in Supremacy Clause jurisprudence. On January 9, 1912, just 39 days before Congress enacted the BIA, this Court decided *S. Ry. Co. v. Reid*, 222 U.S. 424 (1912), in which it held that "[i]t is well settled that if the State and Congress have concurrent power, that of the State is superseded when the power of Congress is exercised." *Id.* at 436. Although deemed "well settled" by the Court, a review of Supremacy Clause jurisprudence reveals that *Reid* was the first time that a majority of the Court adopted the principle of field preemption. Stephan A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 803 (1994). In *Reid*, the Court held that Congress had "taken control of the field" of railroad rate regulation through the Interstate Commerce Commission (ICC), depriving the State of its concurrent power to regulate rates of common carriers operating in interstate commerce. *Reid*, 222 U.S. at 438. It is historically important that the Court first adopted field preemption in a railroad case. As of *Reid*, "the effect of congressional action [was] to end the concurrent power of the States and thereby to create exclusive power at the federal level from that time on." Gardbaum, *supra*, at 801.

It was against this definition of field preemption that Congress enacted the BIA. The BIA gave federal

inspectors the power to declare boilers unfit for service. Act of Apr. 14, 1910, ch. 160, § 2, 36 Stat. 913. Fitness was judged by whether a boiler was safe to operate. *Id.* This necessarily, if impliedly, required federal inspectors to pass both on the design of the boiler (*i.e.*, that a boiler as designed could be safely operated) and on the maintenance of the boiler (*i.e.*, that the boiler had been maintained in good working condition such that it would safely operate as designed). Since the designs of boiler-powered locomotives changed as technology improved, this necessarily would be a moving target. Similarly, the LIA provided the ICC and its inspectors with the flexibility needed to address those changing technologies on the entire locomotive in a timely fashion instead of waiting for piecemeal legislation.

Rather than prescribe specific engine designs, the ICC focused its attention on ensuring that safety equipment was installed so that, whatever the design, the train would be safe to operate. In *Napier v. A. Coast Line R.R. Co.*, 272 U.S. 605 (1926), this Court recognized that the ICC's choice to proceed with safety regulations on a part-by-part basis, rather than to impose specific locomotive designs, was not the relevant inquiry under the Supremacy Clause. Rather, the question was whether the LIA "manifest[ed Congress's] intention to occupy the entire field of regulating locomotive equipment." *Id.* at 611. This Court found that it did: "[T]he power delegated to the [ICC] by the Boiler Inspection Act as amended is a general one. *It extends to the design, the construction*

and the material of every part of the locomotive . . . " *Id.* (emphasis added.)

For the next 44 years, Congress allowed the ICC, and later the Federal Railroad Administration (FRA), to oversee locomotive and passenger-car safety under the LIA and SAA. In 1970, Congress decided a nationally uniform regulatory scheme was required that covered not only for trains, but also for all aspects of railroad safety. It passed the Federal Railroad Safety Act (FRSA), 49 U.S.C. §§ 20102, *et seq.*, which broadened the FRA's jurisdiction to regulate all aspects of railroad safety. Congress recognized that with this expanded power came the risk that local safety conditions would be overlooked and unaccounted for, which in turn might actually increase local safety risks. So, Congress reserved to the States the ability to continue their regulations of local conditions, even in the face of direct federal regulation on point (as long as it was not incompatible with federal law and did not create an undue burden on interstate commerce). Act of Oct. 16, 1970, Pub. L. No. 91-458, § 205, 84 Stat. 972.

Importantly, however, Congress maintained the LIA and the SAA separately from the FRSA. Despite expanding the FRA's sphere of authority and giving States a role to play within that expanded sphere, Congress continued to occupy the field as to the design, construction, and material of locomotives travelling in interstate commerce. Stated differently, Congress continued to withhold from State control the locomotives that crossed State lines, while giving

to the States shared control over the local conditions that were uniquely and wholly within State boundaries.

The petitioners seek to change that dynamic. They argue Congress intended that the 50 jurisdictions through which locomotives travel should be allowed to impose 50 views of what constitutes safe locomotive design and be allowed to punish deviations from their respective views through their tort systems. In short, the petitioners seek to upset a century of exclusive federal authority over locomotive design, construction, and materials. The Court should reject this invitation and reaffirm Congress's determination that locomotive design, construction, and materials should be within the exclusive domain of federal regulators.

SUMMARY OF ARGUMENT

The petitioners and their amici stress that modern preemption analysis requires courts to determine and apply Congress's intent. While this is a fair statement of the law, a critical threshold question has been overlooked: Which Congress's intent governs here? The Budd Company submits that the intent of Congress enacting the LIA should control. The Congress enacting the FRSA specifically chose to keep the LIA as a separate law, and the core language of the LIA at issue has remained unchanged for 100 years.

This Court already ascertained Congress's intent in *Napier*, and it should decline the invitation to revisit that holding as a matter of *stare decisis*. The calls to reinterpret the LIA rest on a flawed belief that *Napier* is now an outlier in preemption jurisprudence because it did not apply the modern presumption against preemption. Importantly, however, the presumption was adopted as a counterweight to Congress's expanded role in traditionally local affairs after the Commerce Clause was given its modern, broader reading. Yet railroads have always fallen within Congress purview, even under the Court's narrower interpretation of the Commerce Clause before the New Deal. Indeed, the doctrine of field preemption was born out of the need for national uniformity in the only mechanized, land-based interstate transportation system existing at the turn of the 20th century. The Court's expansion of the Commerce Clause has not changed the need for national uniformity, and that expansion should not serve as the sole basis for upending a century of settled law.

Applying *Napier* is straightforward. There the Court ruled that Congress had preempted the field of locomotive design, construction, and materials. The petitioners incorrectly try to narrow the field to locomotives "in service" or "operating" on the railways. This is merely an artful way of arguing that only claims involving "locomotives in motion" are preempted. Yet *Napier* defined the field as design, construction, and materials – not movement. And this is the only rational way to define the field. A locomotive's design,

construction, and materials do not change depending on whether it is propelling itself along the rails or in a state of rest at the beginning or end of its journey.

With a properly defined field, the need to preempt State products-liability claims becomes self-evident. In fact, while such claims are of relatively recent vintage (being permitted only since the 1960s), this Court has already ruled that State tort claims alleging poor locomotive engine design are inappropriate under the LIA. *B&O R.R. Co. v. Groeger*, 266 U.S. 521 (1925). The Court found such claims could stifle innovation and that the "varying and uncertain opinions and verdict of juries" on the "comparative merits as to safety or utility" would not serve Congress's goal of having safe design and maintenance judged by expert federal inspectors. *Id.* at 530-531.

Additionally, locomotives have long service lives of 20-30 years or more, and they come with large price tags ($1.5-$2.5 million each). Allowing 50 different States to impose (or coerce, under the petitioners' view) 50 different standards for design, construction, and materials risks grinding the national rail system to a halt. Each design and component would be subject to 50 different standards, in most cases decades after the locomotive was put in service. Without preemption, railroad companies would face a Morton's Fork – either go bankrupt by decommissioning the current fleet because a design or material meets with a jury's disapproval, or go bankrupt by paying out untold numbers of claims. Even if an affordable

redesign were possible, there is no guarantee another State's jury would find that redesign acceptable.

The Court should not be persuaded that Congress intended that kind of economic chaos to befall the railroad industry by enacting the FRSA and its preemption and savings clauses. Rather, the Court should conclude that the FRSA was meant to compliment the LIA and SAA by expanding safety efforts beyond the train itself to all other aspects of railroad operations. The preemption clause invites the States to regulate local safety and security hazards (*e.g.*, grade crossings, train station platforms, utility connections, etc.), while the savings clause permits State courts to compensate for injuries caused by breaches of federal standards and violations of State laws governing local hazards. None of these changes imply that Congress meant to cede the field of locomotive design, construction, and materials it occupied exclusively nearly 60 years earlier.

Even if the Court concludes that the FRSA preemption and savings clauses apply to the LIA, it should still reject the petitioners' State law claims. The 1970 versions of these clauses were not intended to preserve State tort actions based on State tort standards of liability. Similarly, there is no evidence that Congress intended to preserve products-liability actions alleging violations of State standards when it enacted the 2007 amendment to these clauses. Even assuming, however, that Congress intended to save such claims, it only saved actions arising from events or activities occurring on or after January 18, 2002.

Here, the petitioners assert that Mr. Corson was exposed to asbestos between 1949 and 1974. Since he was not exposed on or after January 18, 2002, the petitioners' claims are legislatively foreclosed.

ARGUMENT

A. The intent of the 61st Congress controls, and the 61st Congress intended to preempt the field.

The Court has repeatedly explained that the analysis in preemption cases centers on congressional intent. And so, the petitioners and their amici have (rightly) focused on Congress's intent. Yet, despite substantial briefing, no one has yet identified or answered the critical threshold question: Which Congress's intent governs?

The petitioners and their amici discuss at length the FRSA and the modifications made to the LIA over the years. They overlook, however, that the core of the LIA – that locomotives be designed and maintained for safe use – has remained untouched for a century. Even when the LIA was "repealed," it was simply re-codified in a different title of the United States Code. Although certain sections were deleted, the core language that a locomotive must be safely designed and in proper condition has remained unchanged since the BIA was enacted in 1911, amended to become the LIA in 1915, restated in 1924, and retained in 1970, 1994, and 2007:

1911

"[I]t shall be unlawful for any common carrier . . . to use any locomotive engine . . . *unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe* to operate in the service to which the same are put . . . " Act of Feb. 17, 1911, ch. 103, 36 Stat. 913 (emphasis added).

1915

"[The BIA] shall apply to and include the entire locomotive and tender and all parts and appurtenances thereof." Act of Mar. 4, 1915, ch. 169, 38 Stat. 1192.

1924

"That it shall be unlawful for any carrier to use . . . any locomotive *unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe* to operate in the service to which the same are put . . . " Act of Jun. 7, 1924, Pub. L. No. 68-277, 43 Stat. 659.

1994

"A railroad carrier may use or allow to be used a locomotive or tender on its railroad line *only when the locomotive or tender and its parts and appurtenances – (1) are in proper condition and safe* to operate without unnecessary danger of personal injury. . . ." 49 U.S.C. § 20701.

* * *

Congress's enactment of the FRSA in 1970 had no impact on the scope of the LIA. The LIA continued to read exactly as it had in 1924. In fact, the House Committee on Interstate and Foreign Commerce noted in 1970 that "[o]ver the years there have been several [laws] dealing with certain phases of railroad safety. These include, among others [the LIA] . . . These particular laws have served well. In fact, the committee chose to continue them *without change*." H.R. Rep. No. 91-114 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4105 (emphasis added). It did so to maintain field preemption. The Committee noted that "where the Federal Government has authority [under the LIA] with respect to rail safety, it preempts the field." *Id.* at 4108. The Committee "intend[ed] that those existing statutes [like the LIA] will continue to be . . . administered and enforced *as if this legislation* [the FRSA] *had not been enacted*." 1970 U.S.C.C.A.N at 4114 (emphasis added).

Accordingly, even though the FRSA included a preemption provision, maintaining the LIA as an independent law ensured that there would be no confusion that the States' role under the FRSA (as a co-regulator of intrastate conditions, like grade crossings) was distinct from the field that Congress continued to occupy exclusively under the LIA and SAA: the regulation of train design and maintenance.[2] The Committee "d[id] not believe that safety

---

[2] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) and *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000) are not to the

(Continued on following page)

in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." 1970 U.S.C.C.A.N. at 4109. The purpose was to "permit[] the States to regulate in *new* areas until preempted." *Id.* (emphasis added).

The same was true in 1994. According to the Senate Judiciary Committee, chaired by then-Senator Joseph R. Biden (D-Del.), the amendments to transportation laws affecting railroads "where to restate in comprehensive form, *without substantive changes*, certain general and permanent [transportation] laws and to enact those laws [as part of Title 49]." S. Rep. No. 103-265 (1994). The Committee further explained that:

---

contrary. In those cases, the Court addressed FRSA preemption in the context of railroad safety topics captured in the FRSA – not the LIA or SAA. Train speed and local railroad grade-crossing conditions are the kind of local matters that Congress expanded federal authority to regulate, while leaving States to continue governing these matters either with plenary power (if the FRA had not issued a regulation covering that matter) or limited power (if a regulation had been issued). Neither case stands for the proposition that the FRSA gave the States the power to regulate locomotive design, construction, or materials. Nor should the Court rely on those cases to interpret the FRSA in that way. To do so would read the LIA and the SAA out of the Code. *See Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983) (Kennedy, J.) ("the language and structure of the [FRSA] indicate a congressional intent to leave the [LIA] intact, *including its preemptive effect*" (emphasis added)).

> As in other codification bills . . . , this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance *or impair the precedent value of earlier judicial decisions* and other interpretations. . . . In a codification law, however, the courts uphold the contrary presumption: the law is intended to remain substantively unchanged.

Id. (citing *Finley v. United States*, 490 U.S. 545, 554 (1989), and *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 502 (1871)). *See also Theriat v. Hart*, 2 Hill. 380 (1842). The House Judiciary Committee expressed an identical intent. H.R. Rep. No. 103-180 (1993). This legislative history demonstrates that no change to the LIA was intended and, more importantly, that Congress intended to preserve earlier judicial interpretations of the LIA. By definition, that would include *Napier*.

Similarly, when Congress adopted the savings clause in 2007, it did not change 49 U.S.C. § 20701. And, as was demonstrated by the 1970 FRSA enactment and the 1994 codification, the LIA and the SAA were separately preserved, such that neither the preemption clause nor the savings clause affect locomotive design, construction, materials, or safety appliances.

Since Congress has left untouched the essence of the LIA for 100 years, any analysis of congressional

intent should focus on the intent of the 61st Congress, which enacted the BIA.[3]

In 1911, the House Committee on Interstate and Foreign Commerce indicated that boiler explosions were the main drive behind the BIA. Rep. James R. Mann (R-Ill.), who served as the committee chairman, stated that "[i]t is the belief of all people concerned, both the railroads and the employees, that the passage of this bill will materially result in the lessening of boiler explosions." 46 Cong. Rec. 2071 (1911). Rep. Joseph T. Robinson (D-Ark.) spoke of accidents caused by "defective boilers." *Id.* at 2072. There was also testimony taken by a Senate subcommittee on interstate commerce that inspections would also ensure proper maintenance of boilers to ensure proper operation as designed. S. Doc. No. 61-446 (1911). Thus, Congress was concerned with both boiler design and maintenance. The expansion of the BIA to the entire locomotive with little elaboration strongly suggests that Congress was similarly concerned with

---

[3] While it might strike one as analytically proper to consider the intent of the 63rd Congress, which extended the BIA to the entire locomotive, the only legislative history appears to be a one-page Senate report, which said only: "This measure provides for the inspection of the entire locomotive. Experience has shown it necessary [to safeguard] the lives of those who travel and [operate] locomotives." S. Rep. No. 63-1068 (1915). The 1924 House-sponsored restatement of the LIA noted accidents resulting from the failure of locomotive parts. H.R. Rep. No. 68-490 (1924). These statements suggest that the LIA was adopted for the same reasons supporting enactment of the BIA.

ensuring the safe design and maintenance of the entire locomotive.

This Court ruled as much in *Napier*. There, the "main question . . . is whether the [LIA] has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation." *Napier*, 272 U.S. at 607. It noted that "Congress obviously has the power to do so." *Id.* Thus, the question presented was really whether Congress had clearly manifested its intent to exclude the States from regulating locomotives. The Court concluded that Congress so intended:

> Did the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously it did *not* do so by the [SAA], since its requirements are specific. It did *not* do so by the original [BIA], since its provisions were limited to the boiler. But the power delegated to the [ICC] by the [LIA] is a general one. It extends to the design, the construction and material of every part of the locomotive. . . .

Id. at 611 (emphases added).

Napier's interpretation of congressional intent is informed by *A. Coast Line R.R. Co. v. Georgia*, 234 U.S. 280 (1914). There, the Court upheld a Georgia regulation requiring locomotives to operate with headlights at night. The Court explained that the SAA did not require headlights on locomotives, and the ICC lacked the authority to require them as a safety appliance in connection with the topics covered

under the SAA. So, the Court concluded that Congress did not intend to occupy the field of locomotive headlights under the SAA. But it noted that "Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway." *Id.* at 292. Congress enacted the LIA the year after *Coast Line*, with a simple statement that the BIA was to be extended to cover the entire locomotive. Simply put, Congress had taken the hint from *Coast Line* and supplied the rule – the ICC was to have the exclusive authority to regulate locomotive design, construction, and materials.

B. The presumption against preemption does not apply.

Nonetheless, it is argued that the Court should overrule *Napier* as an outlier in preemption jurisprudence because it did not apply the modern presumption against preemption. This argument fails to appreciate the historical justification for the presumption and why it does not apply here.

The presumption was adopted as a counterweight to the post-New Deal expansion of the Commerce Clause. Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 806 (1994). "This new requirement of intent was . . . a logical result of the restructuring of American federalism that began with the New Deal in 1933 and that was judicially affirmed in 1937." *Id.* With Congress free to invade the States' previously exclusive power over intrastate

commerce, "the consequence of the preexisting preemption doctrine (established while there were still significant areas of exclusive state jurisdiction) would have been to threaten vast areas of state regulation of seemingly local matters with extinction." *Id.* Thus, the presumption against preemption in the absence of clear congressional intent became necessary. *Id.* As Congress began to act in areas that were not historically within the scope of the Commerce Clause, the presumption would help preserve the States' role in our federal system. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

The presumption has no application in this case for two reasons. First, the presumption is "not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000) (explaining that maritime commerce is within Congress's original field of authority: "Congress has legislated in the field from the earliest days of the Republic"); *see also Ray v. A. Richfield Co.*, 435 U.S. 151 (1978). As the Court has previously observed, "[r]ailroads have been subject to comprehensive federal regulation for [now well over] a century." *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 687 (1982) (citing examples dating back to 1887). And that timing coincides with the rise of railroads as the dominant form of the interstate transportation of goods and people. *Compare* McDonald, *supra*, at 1 (noting rapid growth in interstate railroad lines occurred during the 1860s and 1870s) *with* Herbert

Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 Yale L.J. 1017 (1988) (discussing the rise of federal railroad rate regulation in 1866). *See also* Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (an Act to regulate railroads rates) and the SAA enacted in 1893 (27 Stat. 531), which was amended in 1903 (32 Stat. 943) and again in 1910 (36 Stat. 298). From the beginning, then, Congress has determined that national uniformity "is necessary to the operation of the national rail system." *United Transp. Union*, 455 U.S. at 688. "A disruption of service [caused by a break in that uniformity] can cause serious problems throughout the system." *Id.*

Second, Congress enacted, and the *Napier* Court interpreted, the LIA against the strict division of interstate and intrastate commerce historically ascribed to the Commerce Clause. In 1915, regulating the national rail system's vehicles of transportation (locomotives) was within the traditional interstate sphere of Congress, much like regulating vessels engaging in interstate navigation was found to be within that sphere in *Gibbons v. Ogden*, 22 U.S. 1 (1824). The LIA is not an example of Congress using its expanded Commerce Clause powers to reach an area of intrastate commerce historically reserved to the States. Rather, the LIA exemplifies Congress acting in its traditional sphere of control. Even under modern preemption jurisprudence, exerting federal control to achieve national uniformity over the national rail system's vehicles of transportation does not "affect[the] basic State prerogatives [so as] to hamper

the State[s'] ability to fulfill [their] role in the Union and endanger [their] separate and independent existence." *United Transp. Union*, 455 U.S. at 687. "There is no comparable history of longstanding state regulation . . . of the railroad industry." *Id.* at 688.

C. The nature of the preempted field requires preemption of State tort actions based on locomotive design, construction, and materials.

This Court has already ruled that State juries should not be allowed to opine on locomotive design, construction, and materials. In fact, the Court did so before *Napier*. In *B&O R.R. Co. v. Groeger*, 266 U.S. 521 (1925), the widow of a locomotive engineer sued the railroad company under the FELA for what amounted to a defective-design claim when her husband was killed by an exploding boiler. She argued that the explosion was caused by an unsafe or insufficient condition in the boiler, which stemmed from the failure to install a fusible plug in the boiler's crown sheet. The Court agreed that the widow could pursue a negligent-operation claim under State tort law, but it barred any argument tying that claim to the boiler's design. *Id.* at 530-531. The Court explained that neither State courts nor State juries should be permitted to lay down rules restricting design and maintenance:

> There is a multitude of mechanical questions [regarding] the proper construction, maintenance and use of the boilers [and] other parts

> of locomotives . . . *all of which are covered by the [LIA]*. Inventions are occurring frequently . . . Comparative merits as to safety or utility are most difficult to determine. It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives . . . are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries.

Id. (emphasis added). Yet, that is exactly what the petitioners want to do here. They want State court juries to pass on the comparative merits of safety and utility, which in turn will cause State courts to lay down rules concerning locomotive design, construction, and materials.

It may be argued that products-liability claims did not exist in the 1920s when *Groeger* was decided, and that when combined with the Court's modern inclination to preserve State tort-law claims (even when State positive law is preempted), the Court should conclude that Congress could not have manifested clear intent to preempt products-liability claims. (*See* Pet. Merits Br. 38-42, citing *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990); and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). That argument is flawed for two reasons.

First, it proves too much. Whereas it is true that Congress could not have manifested clear intent to

preempt common-law claims that did not exist, it equally follows that Congress could not have intended to preserve that which did not exist in 1911. *Scheiding v. Gen. Motors Corp.*, 993 P.2d 996, 1001 (Ca. 2000). Congressional intent must be judged as of the time Congress acted. *Touche Ross & Co. v. Redington*, 422 U.S. 560 (1979) (noting that the Court must ascertain the intent of the 73rd Congress which passed the Securities Exchange Act in 1934). That is, would Congress *in 1911 and 1915* have intended to allow State juries to pass on locomotive equipment when it did not intend to let State legislatures and State railroad commissions do so? *Groeger* suggests not, as does the fact that such claims would conflict with Congress's desire for national uniformity. This highlights the second flaw in the petitioners' analysis.

Permitting products-liability claims would eviscerate national uniformity in the preempted field, which would be contrary to Congress's intent. This Court has ruled that common-law actions will not be preserved if they are inconsistent with the statute – "[i]n other words, the act cannot be held to destroy itself." *AT&T v. C. Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998). Notably, the case that the *AT&T* Court cited for that proposition, *Tex. & Pac. R.R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), involved a railroad rate case that hinged upon an express savings clause, which provided that the Act did not abridge or alter common-law remedies. Instead, it only added a federal remedy to them. *Id.* at 446. Nonetheless, the Court concluded that the type of

common-law claim being asserted would render the federal law pointless. It decided that the savings clause could only save those State law claims that were consistent with the Act.

Abilene Cotton is also important for another reason. It highlights that, under the nature of field preemption prevailing in the 1910s and 1920s, Congress understood that it needed to expressly preserve common-law claims. Stated differently, Congress knew that field preemption applied to State tort law, and took express steps to save State tort law when it wanted to do so. *See* Act of Feb. 4, 1887, ch. 104, § 22, 24 Stat. 379. The absence of any similar language in the BIA, the 1915 LIA amendment, and the 1924 LIA restatement further supports that Congress did not intend to preserve State tort actions.

The petitioners cite *Industrial Accident Comm'n v. Payne*, 259 U.S. 182 (1922), as an example of the Court permitting State remedies for repair shop injuries. There, a repairman was injured while working on a train in the repair shop. The Court concluded that the FELA did not apply because the train was "nearly stripped and dismantled" at the time of the accident. *Id.* at 188. Since the FELA did not apply, the Court allowed the California Industrial Accident Commission to provide relief under the State's workers' compensation act. Importantly, however, *Payne* neither involved State tort law, nor did it involve any allegations of liability due to locomotive design, construction, or materials. *Id.* at 184. Likewise, the workers' compensation act did not purport to regulate

the design, construction, or materials of the locomotive. *California Workers' Compensation Insurance and Safety Act of 1913*, 1913 Cal. 176.

The petitioners cite *New York C. R.R. Co. v. White*, 243 U.S. 188 (1917) for the same proposition. A review of that case, however, shows that the railroad company tried to plead the FELA as a bar to the State workers' compensation law and lost because the employee was not working in interstate commerce. This was not a case involving a common-law claim, and it never involved locomotive design, construction, or materials. The LIA is never referenced.

The petitioners also mistakenly rely on, *Shanks v. DL&W R.R. Co.*, 239 U.S. 556 (1916), in which a repairman was injured while moving an overhead counter-shaft in a repair shop. He sued under the FELA only. Contrary to the petitioners' argument, this case did not discuss whether the repairman could recover under State tort law – it only addressed whether the FELA applied. The Court decided that the repairman was not engaged in interstate commerce, and he could not maintain his claim. This case, too, did not involve the LIA.

Gilvary v. Cuyahoga Valley Ry. Co., 292 U.S. 57 (1934), does not support the petitioners' position, either. There, the Court decided whether a railroad company and its employee could agree in advance of an injury that any injury claims would be pursued through the State workers' compensation program. The Court found that employees could contract away

their right to sue under FELA. Although *Gilvary* involved an allegation that a railcar lacked an automatic coupler (as required under the SAA), the employee did not argue that he was entitled to relief under a *State* standard of care.

Undeterred, the petitioners argue that this Court has previously authorized non-employees to sue under State tort-law theories to recover for violations of the LIA and SAA. This is true, but the petitioners overlook a crucial fact: none of the plaintiffs in those cases argued that State law governed the design, construction, or material of the locomotive or railcar. Instead, they argued that *federal* law supplied the standard and that the railroad company breached that standard. Such claims are not inconsistent with the federal government occupying the field of design, construction, and material for trains.

For example, in *Crane v. Cedar Rapids & I.C. Ry. Co.*, 395 U.S. 164 (1969), a non-employee was injured by the railroad's failure to maintain its freight cars with the automatic couplers required by federal law. The Court explained that the SAA provided no cause of action for injuries from non-conforming parts, and that the FELA did not apply because the person was not an employee. The Court suggested he had to recover through a State tort action for a breach of a duty imposed under *federal* law to install and maintain automatic couplers. *Id.* at 166-167 (citing *Moore v. Chesapeake & Ohio R.R. Co.*, 291 U.S. 205 (1934)). The Court never suggested that the person could pursue a State tort claim on a theory that the duty of

care regarding the part's design was governed under *State* tort-law standards.

Likewise, the Court found that States were free to give any remedy they so chose for a violation of the SAA in *Tipton v. Atchinson T&SF Ry. Co.*, 298 U.S. 141 (1936). There, the Court found there was no federal question of a State giving relief under State tort law for violation of the *federal* standards set forth in the SAA and the rules promulgated thereunder.

This brings the matter full circle. The SAA and the LIA preempt the field as to safety appliances and locomotive design, construction, and materials. State tort actions giving injured persons (not covered under FELA) the right to recover for a railroad's failure to comply with the *federal* rules governing the preempted field do not destroy Congress's goal of national uniformity. In fact, such actions serve to *enforce* national uniformity. But permitting State tort law to invade and rewrite the preempted areas of design, construction and materials through State jury verdicts would *infringe* upon national uniformity, taking such matters away from the Secretary of Transportation's exclusive regulatory authority. *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171, 178 (Ala. 2002).

The Court has previously observed this distinction in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 881 (2000). There, the Court noted that if State tort law imposes a duty to install airbags on all vehicles, then it effectively becomes a mandatory State law requirement, despite the federal decision to phase in airbags during the relevant time period.

This is because tort law seeks to accomplish more than just compensation:

> "Apart from compensating victims . . . , the purpose of tort liability is to induce defendants *to conform their conduct* to a standard of care established *by the State*. A railroad equipment manufacturer found to have negligently designed a braking system, for example, is expected to modify that system to reduce the risk of injury. If the manufacturer fails to mend its ways, its negligence may be adjudged willful in the next case, prompting a substantial punitive damages award. If each State were to adopt different liability-triggering standards, manufacturers would have to sell locomotives [with] equipment [that] could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined.

Scheiding v. Gen. Motors Corp., 993 P.2d 996, 1001 (Ca. 2000), *cert. denied*, 531 U.S. 958 (2000) (citations omitted) (emphases added). This is precisely the patchwork quilt the States will knit, despite contrary assurances from petitioners' amici.[4] (AAJ Br. at 14,

---

[4] Similarly, it is of little comfort that "there is general agreement on the standard for an unreasonably dangerous product." (AAJ Br. at 14, n. 4.). Even assuming that to be true, there are as many ways to apply a standard as there are juries. The railroads and manufacturers will be forced to comply with whatever is required by any given jury's application of the

(Continued on following page)

n. 4.) And patches to the quilt will be continuously added to cover every unique locomotive design, construction, and material in service. National uniformity could not survive in the face of such an onslaught.

This is also true as to the petitioner's failure-to-warn claim. "[S]tates could promulgate otherwise preempted safety regulations in the guise of instructional labels and then create causes of action for injured works if railroads failed to post them." *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458, 461 (2d Cir. 1999). Indeed, products-liability actions do not impose liability simply for failures to warn; *inadequate* warnings are also generally compensable. *See, e.g.*, *Restatement (Third) of Torts: Products Liability* § 2 ("A product is defective . . . because of inadequate instructions or warnings"). A railroad company or a manufacturer could be found liable for not providing a warning and then, after crafting and giving a warning, be found liable because a second plaintiff believes that the warning did not sufficiently warn him of the danger. This could easily lead to 50 different determinations of what kind of warning is sufficient. Some States may require pictures. Some States may require specific wording. Other States,

---

standard. As sure as the United States Courts of Appeals split in how they apply rules established by this Court, juries are sure to apply the same standard in different ways. The problem is exacerbated when substituting States into the analysis; there are four times as many State jurisdictions as there are federal circuits.

like border States with bilingual populations, may require the warning to be written in two languages. Other States may require certain colors and fonts. Size and shape may also be dictated.

And, the problem does not end there. Dozens of locomotive designs exist, each with unique part configurations. Where must the warning(s) be placed? Some States may require the warnings to be posted in the roundhouse. Each roundhouse would be plastered with warnings for all sorts of locomotives and their individually tort-regulated parts (which, ironically, in the aggregate may subject a railroad company to yet another claim of inadequate warnings because the relevant warning will be lost in the sea of warnings). Other States might require the warnings to be on the locomotive. This raises yet another location question: should the warning be in the cab, on the exterior of the locomotive, or on the interior near the tort-regulated part? This in turn raises size and legibility issues because there may be different warnings mandated by the States requiring the warning to be placed on the part. How can all these warnings be squeezed into a finite area on the locomotive? Presumably, these issues, too, would be a matter of State tort law under the petitioners' theory. The answers to these questions would destroy national uniformity.

D. Even if the FRSA savings clause applies, the petitioners' claims remain preempted.

Should the Court determine that the LIA must be read as part of the FRSA, it may accept the argument

advanced by some amici that the savings provision under 49 U.S.C. § 20106(a)(2) applies. It is argued that because this section expressly permits States to adopt railroad safety laws, regulations, or orders (i.e., requirements), Congress intended to preserve State tort actions. Supporters appear to rely on *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), which explained that, "Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments. Absent other indication, reference to a State's 'requirements' includes its common-law duties." *Id.* at 324. This argument suffers from several flaws.

As an initial matter, *Medtronic* was decided a year after Congress amended the FRSA in 2007 to include § 20106(b)-(c). Congress could not have relied on a Court decision that had not been rendered at the time (much less back in 1970). *Medtronic* cannot be used to infer that Congress intended to include common-law claims.

It is also important that the 2007 amendment expressly saves common-law claims that had been ruled preempted by a federal district court. In fairness, this can be read in one of two ways. First, it could be construed that Congress was correcting what it believed to be an erroneous interpretation of the savings clause in § 20106(a)(2). Second, it could be construed that the 110th Congress (2007) wanted to change the 91st Congress's (1970) intent that common-law claims be preempted.

Unfortunately, the legislative history is vague. What little exists supports the idea that Congress did not intend to save State actions based on State tort standards of liability. Notably, the current § 20106(b) is different than what was originally introduced. Representative Bennie Thompson (D-Miss.) offered a broader-than-enacted version of the savings clause as an amendment to an omnibus transportation-security bill designed to implement recommendations from the 9/11 Commission less than four hours before a vote on the bill:

> Sec. 3 NO PREEMPTION OF STATE LAW
>
> (a) No Preemption of State Law. – Nothing in Section 20106 . . . preempts a State cause of action, or any damages recoverable in such an action, including negligence, recklessness, and intentional misconduct claims, unless compliance with State law would make compliance with Federal requirements impossible. Noting in section 20106 . . . confers Federal jurisdiction for such a cause of action.
>
> (b) Secretarial Power. – Section 20106 . . . preempts only positive laws, regulations or orders by executive or legislative branch officials that expressly address railroad safety or security. The Secretary [has] the power to preempt such positive enactments by [regulation].

H.R. Rep. No. 110-1401, § 3(a)-(b) (2007). Given the short notice, only three congressmen appear to have had a chance to debate its merits, two of which supported it as a way to stop "an expansive application of preemption to deprive accident victims' access to state remedies," 153 Cong. Rec. H3128 (2007), and one opposed it as departing from national uniformity: "States will be free to pass 50 different sets of safety regulations, and trains are going to have to stop at the border and comply with this, that, or the other thing . . . It is going to undo the fabric of our Nation's rail system. . . ." *Id.*

The Thompson Amendment was never enacted into law. Although passed by the House, it never cleared the Senate. Since the two chambers passed non-identical security bills, a reconciliation conference was held, and the savings clause was rewritten into its current, much narrower form. H.R. Conf. Rep. 110-259 (2007). This is important because 49 U.S.C. § 20106 as enacted does not save *all* State tort actions. It only saves those actions alleging a violation of federal standards, of private standards adopted under a federal regulation, and of a State law, regulation, or order. § 20106(b)(1)(A)-(C). Moreover, the enacted version appears to have been a compromise between Rep. Thompson's proposal and a proposal offered by the American Association of Railroads, which would have only been limited to positive federal law:

> Nothing in this section shall be construed to preclude an action under State law seeking damages for personal injury or property

> damage alleging that a party has violated a specific requirement set forth in a regulation or order issued by the Secretary. This provision shall apply to all causes of action which accrue on or after the effective date of this Act. Nothing in this provision shall otherwise affect the scope of application of this section as interpreted by the U.S. Supreme Court in *CSX Transportation, Inc. v. Easterwood* and *Norfolk Southern Railroad v. Shanklin*.

Frank J. Mastro, *Congress Clarifies the Preemptive Effect of the Federal Railroad Safety Act*, The Transp. Lawyer 40, 42 (Oct. 2007). This further suggests that Congress consciously chose to save State actions based on State and federal positive law, but not State actions based on State *tort* law. Indeed, this would give a symmetrical reading to each enacted subsection as allowing State actions to remedy violations of positive law – federal (positive) law, private rules (positively) adopted by railroad companies, and State (positive) law. Adopting the petitioners view would render § 20106(b)(1) asymmetrical, saving State actions based on federal (positive) law, private rules (positively) adopted by railroad companies, and State (positive *and common*) law. Considering that it would be another year before *Medtronic*, an asymmetrical construction is unwarranted.

But even if the Court were to construe § 20106(b)(1)(C) as saving State tort law, it does not necessarily follow that *products-liability* actions should be saved. The 2007 Amendment was passed in response to the Minot train derailment in North

Dakota, which was caused by a faulty "plug rail" in the railroad track. Frank J. Mastro, *Preemption Is Not Dead*, 37 The Transp. L.J. 1, 9 (2010). *The accident had nothing to do with locomotive design, construction, or materials. Id.* at 9, n. 56. Those injured by the derailment brought State law claims alleging that the railroad track had been negligently inspected under FRA regulations. The Eighth Circuit preempted the claims, finding that the FRA had set the standard for track inspection and compliance with those standards precluded liability. *Lundeen v. Canadian P. Ry. Co.*, 447 F.3d 606, 613-15 (8th Cir. 2006). The 2007 Amendment legislatively overruled *Lundeen* so as to afford injured parties an opportunity to argue that the *federally* required inspections were not performed competently. It does not necessarily follow that Congress intended for State tort law to supplant federal standards at the expense of national uniformity. After all, the amendment did not repeal § 20106(a), which provides that railroad safety laws "shall be nationally uniform to the extent practicable."

Nonetheless, even if one assumes that Congress intended to act more broadly to correct both an erroneous court decision *and* to broaden the types of claims injured parties could bring (including those based on State tort law), the savings clause would still not save the petitioners' claim. The statute saved only "State law causes of action arising from events or activities occurring on or after January 18, 2002."

49 U.S.C. § 20106(b)(2).[8] Here, the petitioners allege that Mr. Corson was exposed to asbestos between 1949 and 1974. (Pet. Cert. Br. at 13.) Accordingly, this action falls outside the savings clause, even affording it the broadest interpretation possible.

CONCLUSION

The Nation needs national uniformity in the regulation of locomotive design, construction, and materials. Congress recognized as much when it enacted the LIA, and so did this Court when it decided *Napier*. The Court should affirm *Napier*'s continuing vitality and affirm the Third Circuit's decision to preempt State tort actions based on locomotive design, construction, and materials.

Even if the Court is persuaded that the FRSA modified the LIA and decides to apply the FRSA's

[8] This is further evidence that a legislative compromise reconciled the railroad industry's desire to limit liability exposure to 2007 with Rep. Thompson's desire to leave liability to State law limitations periods (as presumed from his proposal's lack of an effective date). The compromise provided a five-year liability window tied to the Minot accident prompting the amendment. Combined with the internal symmetry that a "positive law only" reading yields and with the rejection of Rep. Thompson's proposal to preempt only State positive law, the short liability window makes an even stronger case that Congress believed, both before and after 2007, that allowing the States to apply their own common-law standards would thwart its goal of national uniformity.

preemption and savings clauses, it should hold that those clauses do not save State products-liability actions from preemption. The clauses save State tort actions based upon the failure to adhere to federal and State positive law, not breaches of State common law. Finally, even if the Court is persuaded otherwise, the petitioners' claims fall squarely outside the January 18, 2002 liability commencement date.

Respectfully submitted,

JOSEPH E. RICHOTTE
Counsel of Record

DANIEL R.W. RUSTMANN
JAMES E. WYNNE
BUTZEL LONG, P.C.
150 West Jefferson Avenue, Suite 100
Detroit, Michigan 48226
(313) 225-7000

Attorneys for Amicus Curiae
ThyssenKrupp Budd Company

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
OCT 7 - 2011
OFFICE OF THE CLERK

No. 10-879

IN THE

Supreme Court of the United States

GLORIA GAIL KURNS, Executrix of the Estate of George M. Corson, Deceased, *et al.*,
Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORP., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Daniel J. Popeo
Michael P. Wilt
Richard A. Samp
(Counsel of Record)
Washington Legal Found.
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Date: October 7, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

QUESTION PRESENTED

Whether the Locomotive Inspection Act, 49 U.S.C. § 20701, *et seq.*, preempts state-law tort claims involving the design, construction, and safety of railroad locomotive equipment.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vii

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. THERE IS NO REASON TO PLACE A THUMB ON THE SCALE BY PRESUMING THAT CONGRESS WOULD NOT HAVE INTENDED TO DEPRIVE PETITIONERS OF THE RIGHT TO SUE EVERY CONCEIVABLE DEFENDANT 9

A. When Construing the LIA, We Look to the Language and Statutory Framework in Order to Discern Congress's Intent, Which is the Ultimate Touchstone. Petitioners' Presumption Argument Runs Directly Counter to That Rule of Statutory Construction 9

B. To the Extent That There is Any Presumption of the Sort Asserted by Petitioner, It Is Limited to a Presumption That Congress Would

Page

Be Reluctant to Deny an Injured Party *All* Meaningful Relief - *i.e.*, to Deny an Injured Party a Right to Sue Anyone 10

C. The *Silkwood/Medtronic* Presumption (to the Extent It Exists) Is Inappalicable Here Because Petitioner (and Every Railroad Worker) Has an Effective Cause of Action Under FELA Against His Employer 11

D. There Is No Merit to Petitioners' Claim That An "Effective Remedy" Requires That Railroad Workers Be Permitted to Sue Both Their Employer and Locomotive Manufacturers 14

1. A "failure to warn" claim will almost always be easier to prove against an employer than against a product manufacturer, and thus a regime allowing only the former type of suit is a more than adequate remedy 14

Page

2. FELA's "slightest negligence" standard means that railroads will almost always be liable for workplace injuries suffered by railroad workers, while workers will have a more difficult time prevailing against a manufacturer 16

E. LIA Preemption Would Not Leave Those Other Than Railroad Employees Without an "Effective Remedy" 17

1. The Court does not need to decide whether non-employees' tort claims are preempted, but many such workers would have an adequate remedy under workers compensation 18

2. Railroads may privately contract for contribution in their purchase contracts with product manufacturers 19

II. THE FEDERAL RAILROAD SAFETY ACT DID NOT CHANGE THE PREEMPTIVE EFFECT OF THE

Page

LOCOMOTIVE INSPECTION ACT AS DECIDED BY THIS COURT IN *NAPIER* 20

A. The Principles of *Stare Decisis* Should Guide the Court in Rejecting a Challenge to a Decision That Is 85 Years Old 22

B. The FRSA Did Not Alter The Preemptive Effect of the Locomotive Inspection Act as Decided in *Napier* 25

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

Cases:

Atchison, T. & S., F.R. Co. V. Buell, 480 U.S. 557 (1997) 17

Bates v. Dow AgroSciences LLC, 544 U.S. 431 (2005) 1

Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947) 23

Brusewitz v. Wyeth, 131 S. Ct. 1068 (2011) 1, 10

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) 22, 23

California v. Taylor, 353 U.S. 553 (1957) 23

Cipollone v. Liggett Group, 505 U.S. 504 (1992) ... 9

Consolidated Rail Corp. v. Pa. Pub. Util. Comm'n, 536 F. Supp. 653 (E.D. Pa. 1982) 23

Consolidated Rail Corp. v. Pa. Pub. Util. Comm'n, 696 F.2d 981 (3d Cir. 1982) 23

Consolidated Rail Corp. v. Pa. Pub. Util. Comm'n, 461 U.S. 912 (1983) 23

CSX Transp. Inc., v. McBride, 131 S. Ct. 2630 (2011) 13

Page(s)

Fulmore v. CSX Transp., Inc., 252 Ga. App. 884, 557 S.E. 2d 64 (2001) 16

Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1950) 23

Hilton v. South Carolina Public Railways Comm'n, 502 U.S. 197 (1991) 18, 19

Jones v. Rath Packing Co., 430 U.S. 519 (1977) ... 9

Kernan v. American Dredging Co., 355 U.S. 426 (1958) 12

Marshall v. Burlington N., Inc., 720 F.2d 1149 (9th Cir. 1983) 29

Medtronic, Inc., v. Lohr, 518 U.S. 470 (1996) 10, 11, 14

Napier v. Atlantic Coast Line Railroad Co., 272 U.S. 605 (1926) ..... *passim*

National Bank v. Whitney, 103 U.S. 99 (1881) 25

Norfolk & Western Railway Co. v. Ayers, 538 U.S. 135 (2003) 13, 16

Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n, 413 A.2d 1037 (Pa. 1980) 23

Page(s)

Norfolk S. Ry. v. Sorrell, 549 U.S. 158 (2007) .. 2, 11

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 22

Planned Parenthood v. Casey,
505 U.S. 833 (1992) 24

Ray v. Atl. Richfield Co., 435 U.S. 151 (1978) 23

Rogers v. Missouri Pacific R. Co.,
352 U.S. 500 (1957) 13

Riegel v. Medtronic, Inc., 522 U.S. 312 (2008) 1

Sanders v. CSX Transp., Inc., 2000 U.S. Dist.
LEXIS 22707 (S. Dist. of Geo. 2000) 16

Shenker v. Baltimore & Ohio Railroad Co.,
374 U.S. 1 (1964) 17

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984) 10, 11, 14

Sinkler v. Missouri Pac. R.R. Co.,
356 U.S. 326 (1958) 12, 13

Southern Ry. Co. v. Lunsford,
297 U.S. 298 (1936) 23

United States v. Title Ins. & Trust Co.,
265 U.S. 472 (1924) 24

Page(s)

Vasquez v. Hillery, 474 U.S. 254 (1986) 22

Welch v. Texas Dep't of Highways & Public Transp., 483 U.S. 468 (1987) 22

Statutes and Constitutional Provisions:

Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.* ..... *passim*

45 U.S.C. § 55 20

Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20101 *et seq.* ..... *passim*

49 U.S.C. § 20105 28

49 U.S.C. § 20106 26

49 U.S.C. § 20106(a) 29

Locomotive Inspection Act ("LIA"), 49 U.S.C. § 20701 *et seq.* ..... *passim*

Miscellaneous:

Andrew Kull, *The Source of Liability in Indemnity and Contribution*, 36 Loy. L.A. Rev. 927 (2003) .. 20

Barry I. Castleman, *Asbestos: Medical and Legal Aspects* 1 (4th ed. 1996) 16

Page(s)

H. Rep. No. 91-1194,
1970 U.S.C.C.A.N. 4105 ..... 27, 28

HR Rep. No. 1194, 91st Cong.,
2d Sess. 8 (1970) 29

Proceedings of the Fifteenth Annual Meeting of the Medical and Surgical Section 90
(Association of American Railroads,
Atlantic City, NJ 1935) 16

S. Rep. No. 103-265 28

Victor E. Schwartz, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. Cin L. Rev. 38 (1983) 15

Victor E. Schwartz, *Effective Communication of Warnings in the Workplace: Avoiding Injuries in Working with Industrial Materials*,
73 Mo. L. Rev. 1 (2008) 15

William Lloyd Prosser, *The Law of Torts* 80
(4th Ed. 1971) 13, 17

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

To that end, WLF has appeared before this Court and other federal courts in numerous cases involving preemption issues to point out the economic inefficiencies often created when multiple layers of government seek simultaneously to regulate the same business activity. *See, e.g., Brusewitz v. Wyeth*, 131 S. Ct. 1068 (2011); *Riegel v. Medtronic, Inc.*, 522 U.S. 312 (2008); *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005). WLF is concerned that individual freedom and the American economy both suffer when state law, including state tort law, imposes upon industry an unnecessary layer of regulation that frustrates the objectives or operation of specific regulatory regimes, such as (in this case) federal regulation of railroad safety.

WLF is also concerned that courts not seek to displace Congress as the principal arbiter of the proper balance between federal and state regulation of specific industries. Congress adopted the Locomotive Inspection Act, 49 U.S.C. § 20701 *et seq.*, for the purpose of

---

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to this filing; blanket letters of consent have been lodged with the Court.

regulating the design, construction, and materials of locomotives and their parts and appurtenances. In a decision issued more than 85 years ago, this Court interpreted the LIA as an expression of Congress's desire to broadly preempt the field of locomotive safety, thereby preempting state efforts to regulate that same field. Congress implicitly ratified that interpretation in the ensuing decades by leaving intact the LIA's key features at the same time that it was addressing other issues related to railroad safety. The regulatory regime established by the LIA has worked well for a century. WLF believes that if the federal government is to alter that regulatory regime, the impetus for doing so should come from Congress, not from the courts.

STATEMENT OF THE CASE

Extensive federal regulation of railroad safety extends well back into the 19th century. Beginning in the early 20th century, Congress extended that regulation to include creation of a federal tort remedy for injured railroad workers. The Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, was adopted in 1908 in response to concerns that state tort remedies were inadequate to provide compensation to the growing number of railroad employees injured while on the job. FELA created a "comprehensive scheme" for providing such compensation. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165 (2007). In order to avoid a patchwork of overlapping compensation schemes, FELA provided that the law should be the *exclusive* compensation scheme for covered railroad workers, thereby "preempting state tort remedies." *Id.* FELA provides a federal cause of action for an employee of the railroad who is injured on

the job due to employer negligence.

In 1911, Congress adopted the LIA to address safety concerns regarding locomotives. The LIA delegates to the federal government a general power to regulate the design, construction, and material of every part of the locomotive, tender, and of all appurtenances. Pet. App. 9a, *quoting Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 611 (1926). In adopting the LIA, Congress intended "to occupy the field" of locomotive safety, thereby precluding state regulation of that field. *Id.* at 613. The LIA did not, of course, preempt the federal compensation scheme established by FELA; employees could recover damages incurred as a result of a railroad's failure to comply with federal locomotive safety regulations established pursuant to the LIA.

In 1970, Congress passed a comprehensive railroad safety statute, the Federal Railroad Safety Act (FRSA), Pub. L. No. 91-458, 84 Stat. 971 (1970). The FRSA was enacted "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. In doing so, Congress made clear that it was not displacing the LIA's regulation of locomotives, which Congress determined had been operating effectively and should be continued. Rather, the purpose of the FRSA was to expand federal authority to areas of railroad safety not already covered by existing laws.

Petitioners are representatives of the estate of George Corson, who worked for the Chicago, Milwaukee, St. Paul & Pacific Railroad (the "Soo Line") between

1947 and 1974. Pet. App. 3a. After retiring from the railroad, Corson was diagnosed with malignant mesothelioma. *Id.* Petitioners allege that he contracted the disease due to on-the-job exposure to asbestos, a material found in the insulation of locomotive boilers and brake shoes with which he worked as a railroad employee. *Id.* In 2007, he filed suit in Pennsylvania state court against 59 defendants, including his former employer, seeking damages under both FELA and state common law.

Because one defendant was a Pennsylvania corporation, the case was not at first eligible for removal to federal court. But following the dismissal of claims against that defendant in 2008, Respondents Railroad Friction Products Corporation (RFP) and Viad Corp. removed the case to federal court on the basis of diversity of citizenship. RFP and Viad were named as defendants based on allegations that they supplied the Soo Line with asbestos-laden locomotive parts to which Corson was exposed.

The federal district court granted summary judgment to RFP and Viad. Pet. App. 22a-39a. It cited *Napier* in support of its holding that the state law product liability claims asserted by Corson, now represented by his estate and widow following his death, were preempted by federal law.

The Third Circuit affirmed. *Id.* at 1a-22a. It unanimously held that "the plaintiffs claims are preempted by the LIA." *Id.* at 6a. Citing *Napier*, the Court held that "the LIA preempts a broad field relating to the health and safety of railroad workers, including

requirements governing the design and construction of locomotives, as well as equipment selection and installation." *Id.* at 11. Finding that Congress adopted the LIA in order to avoid a patchwork regulatory system that would require railroads either to adhere to the regulations of the State imposing the strictest safety standards or to change locomotive parts as their trains crossed state lines, the court concluded that Congress intended to preempt common law tort suits to avoid just such a patchwork system. *Id.* at 12a-14a. The court noted that its preemption decision was consistent with all but one of the appellate courts that had addressed the LIA's effect on common law tort suits. *Id.* at 14a-16a.

The Third Circuit rejected Petitioners' assertion that, in adopting the FRSA in 1970, Congress intended to narrow the scope of the LIA's preemption. Pet. App. 18a-21a. The court concluded that the purpose of the FRSA was to "maintain broad federal regulatory authority and ensure nationwide uniformity of locomotive standards." *Id.* at 19a. Citing the FRSA's statement that "[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable," 49 U.S.C. § 20103(a), the court concluded that in passing the FRSA, Congress did not intend to disturb the existing framework of federal preemption established by the LIA. *Id.* at 20a.

SUMMARY OF ARGUMENT

WLF agrees with RFP and Viad that the LIA occupies the field of locomotive equipment design and manufacture, and thus broadly preempts common law

tort claims that challenge the design and manufacture of locomotive equipment. WLF writes separately to address two claims raised by Petitioners.

First, Petitioners ask the Court, when interpreting the LIA, to place a thumb on the scale, creating a presumption against preemption of tort remedies when, as here, the result of preemption is to deprive claimants of the ability to seek recourse against *every one* of the entities that may have contributed to their injuries. Petitioners assert that Congress should be presumed not to intend such preemption, in the absence of clear statutory language to that effect. That assertion is without merit. There is no reason to depart from normal rules of statutory construction simply because those rules might lead to a conclusion that claims against *some defendants are preempted*. At most, the Court has on occasion suggested a reluctance to conclude that Congress has intended to deprive injured plaintiffs of *all* means of obtaining compensation for their injuries.

But the Court need not address that reluctance here because the Third Circuit decision does not ascribe to Congress such an intent, nor does the decision have the effect of denying claimants effective avenues of relief. The vast majority of those seeking compensation for railroad-related injuries are, like Corson, current or former railroad employees. FELA provides an extremely generous federal-law compensation scheme to all such individuals. While the LIA bars railroad employees from *also* seeking compensation from a small number of third parties involved in the design and manufacture of locomotive equipment, there is little

reason to think that FELA will not provide railroad workers with adequate compensation if they have suffered an on-the-job injury due to the negligence of others. In particular, it is difficult to imagine cases in which a railroad could be deemed non-negligent in failing to provide its employees with warnings regarding on-the-job dangers, and yet a third party not present at the job site could be faulted for failing to provide those same warnings.

Second, in addressing the preemption issue, the Court ought to bear in mind that it is up to Congress, not the courts, to determine when the need for a nationwide regulatory policy warrants preemption of federal law. It has been accepted law since 1926 that Congress, in adopting the LIA, intended to occupy the field of locomotive design and manufacture, thereby preempting state regulation of that field. The overwhelming majority of state and federal courts has determined over the course of decades that the LIA's preemptive effect extends to state common law tort actions.

Petitioners and their supporting *amici* argue that *Napier* is out of step with modern case law and urge the Court to overrule or modify *Napier*'s broad field preemption holding. WLF respectfully submits that any effort to modify *Napier* would be inappropriate at this late date. The rationale for adhering to principles of *stare decisis* is at its strongest when, as here, a court decision is based on construction of a federal statute and Congress has seen fit to leave that statute in place for many years thereafter. It is largely irrelevant whether current justices would have decided *Napier* the same

way had they been sitting on the Court in 1926. The salient fact is that *Napier*'s field preemption holding has been the law of the land for 85 years. If a change is to be made now, Congress – whose job it is to determine when to preempt state laws – is the appropriate body to make that change. It has had numerous opportunities to amend the LIA to eliminate its field preemption component. On each such occasion, Congress has chosen to leave the LIA in place. In particular, when Congress adopted the FRSA in 1970, it made clear that while it sought to increase regulatory oversight of other areas of railroad operations in order to increase safety, it left the LIA intact because it believed that the LIA was effectively regulating the design and manufacture of locomotives.

ARGUMENT

I. THERE IS NO REASON TO PLACE A THUMB ON THE SCALE BY PRESUMING THAT CONGRESS WOULD NOT HAVE INTENDED TO DEPRIVE PETITIONERS OF THE RIGHT TO SUE EVERY CONCEIVABLE DEFENDANT

Petitioners claim that preemption of state tort suits by the LIA would deprive some plaintiffs of the opportunity to sue every possible defendant. They insist that this Court's precedent urges a presumption against preemption when doing so would deny all meaningful relief to an injured worker. To the extent that such a presumption exists at all, this Court has deemed it applicable when, as here, the federal regulatory scheme leaves injured workers with ample avenues for relief.

A. When Construing the LIA, We Look to the Language and Statutory Framework in Order to Discern Congress's Intent, Which is The Ultimate Touchstone. Petitioners' Presumption Argument Runs Directly Counter to That Rule of Statutory Construction

In determining a preemption issue, the question of whether a state law or rule is preempted by federal law turns on the intent of Congress, which is the "ultimate touchstone." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992). The intent of Congress can be determined if it is "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id. quoting Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Petitioners' presumption that Congress would have intended for injured workers to be able to sue every conceivable defendant requires the Court to place a thumb on the scale in interpreting the statutory scheme. This runs counter to the rules of statutory construction. There is no presumption that Congress, when passing the federal railroad safety statutes, intended injured workers to be able to sue every possible defendant. Petitioners confuse a reluctance to deny all meaningful relief to injured workers with the unsupported belief that Congress would, without saying so, permit injured workers to sue every defendant. The statutory context in which the LIA must be read reveals no congressional intent to permit every conceivable means of recovery.

B. To the Extent That There is Any Presumption of the Sort Asserted by Petitioner, It Is Limited to a Presumption That Congress Would Be Reluctant to Deny an Injured Party *All* Meaningful Relief - *i.e.*, to Deny an Injured Party a Right to Sue Anyone

Petitioners assert that Congress would never have intended to deprive injured workers of all remedies without expressly saying so. *See* Pet. Br. 43. The Government's brief also asserts, without citing any case law on point, that it would be unjust to deny suits against all defendants. U.S. Br. 20. Rather than refusing to find preemption when some means of judicial recourse are unavailable, the Court has been suspicious of preemption only when "all means of judicial recourse" would be cut off. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). The Court has "expressed doubt that Congress would quietly preempt product-liability claims without providing a federal substitute." *Brusewitz v. Wyeth*, 131 S. Ct. 1068, 1080 (2011). But these doubts do not come into play when, as here, other adequate avenues for relief are available.

In *Silkwood*, federal law provided no cause of action, whether implied or explicit, for an injured nuclear worker. While Congress intended federal safety regulations to preempt state regulation, it did not intend to preempt state tort claims when doing so would deprive a worker of *all* means of judicial recourse. *Silkwood*, 464 U.S. at 251. Likewise, in *Medtronic, Inc., v. Lohr*, the Court expressed a reluctance to interpret the MDA as preempting state tort claims because doing

so would have prevented most, if not all, plaintiffs from suing an industry that the MDA intended to regulate out of concern for consumer safety. 518 U.S. 470, 487 (1996). The Court stated that Congress would have been unlikely to preempt all state tort claims under these circumstances. But the Court has never suggested that Congress should be presumed to have intended to permit plaintiffs to sue *all* possible defendants.

C. The *Silkwood/Medtronic* Presumption (to the Extent It Exists) Is Inappalicable Here Because Petitioner (and Every Railroad Worker) Has an Effective Cause of Action Under FELA Against His Employer

Mr. Corson – like every railroad employee – had a cause of action under FELA. An injured railroad worker has a remedy when he is injured on the job. FELA provides an *exclusive* remedy for injured railroad workers. 45 U.S.C. § 51. FELA provides a federal cause of action for employees of railroads against their employers, displacing all state causes of action for employment related-injuries. *Norfolk S. Ry v. Sorrell*, 549 U.S. 158, 165 (2007) ("In response to mounting concern about the number and severity of railroad employees' injuries, Congress in 1908 enacted FELA to provide a compensation scheme for railroad workplace injuries, pre-empting state tort remedies.") FELA took the limited remedies available against the railroads and third-parties in state court and adopted a federal remedial scheme that is extremely generous to railroad workers.

At common law, remedies for railroad workers

were limited, and often it was very difficult to prevail in state court. Congress knew just how difficult it was for railroad workers to prevail, and "it came to be recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks of the business and who were largely helpless to provide adequately for their own safety." *Kernan v. American Dredging Co.*, 355 U.S. 426, 431 (1958). For most employees in the workforce, workers' compensation was the method for recovery against their employer. *Id.* For railroads, "FELA ... provides the framework for determining liability for industrial accidents." *Id.* It is intended to be a broad framework, providing a liberal recovery to injured workers that can be "developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." *Id.* at 432.

The Court has acknowledged that FELA was created to shift the burden of injury from the employee, who otherwise had trouble recovering anything for injuries sustained in such a dangerous profession, to the carrier, who is in the unique position – with "special responsibility" – to protect their own employee. When passed, it was "the conception of this legislation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor." *Sinkler v. Missouri Pac. R.R. Co.*, 356 U.S. 326, 330 (1958). This expense of railroad injury was recognized by Congress to be the burden of the railroad and "FELA seeks to adjust that expense equitably between the

worker and the carrier." *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135, 165 (2003), *quoting Sinkler*, 356 U.S. at 329. Before adoption of FELA, the "'harsh and technical' rules of state common law had "made recovery difficult or even impossible" for injured workers." *CSX Transportation Inc., v. McBride*, 131 S. Ct. 2630, 2638 (2011).

As the Court recently reaffirmed in *McBride*, the "inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit." *Rogers v. Missouri Pacific R. Co*, 352 U.S. 500, 508 (1957). This is an extraordinarily easy standard to meet. As Dean Prosser wrote, FELA "reduces the extent of the negligence required, as well as the quantum of proof necessary to establish it, to the 'vanishing point.'" William Lloyd Prosser, *The Law of Torts* 80, at 536 (4th Ed. 1971). Even the slightest bit of circumstantial evidence will suffice. *Rogers*, 352 U.S. at 508 ("The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.").

Petitioners admit that Mr. Corson and other railroad workers have a cause of action available to them against the railroad that employed them for failure to warn regarding the dangers of asbestos. Pet. Br. 42. While the claim was dismissed in the state court on summary judgment grounds, there was an effective cause of action for Mr. Corson and his estate under the FELA. JA99.

The question in *Medtronic* and *Silkwood* was whether *any remedy* existed at all if preemption of state tort suits were found. Because some means of judicial recourse exists for the Petitioners under FELA (a broad remedy with the slightest burden), the unfairness of which the United States and Petitioners complain results from a failure to prevail under an available remedy against the railroad rather than an inability to sue anyone, anywhere.

D. There Is No Merit to Petitioners' Claim That An "Effective Remedy" Requires That Railroad Workers Be Permitted to Sue Both Their Employer and Locomotive Manufacturers

Petitioners also claim that there will be instances in which a railroad worker is unable to sue anyone but the manufacturer because the railroad is not negligent whatsoever. This is simply an implausible claim. There is nothing in the record to suggest that the manufacturer had superior knowledge that would have allowed it to warn Mr. Corson while the railroad would have been unable to do the same.

1. A "failure to warn" claim will almost always be easier to prove against an employer than against a product manufacturer, and thus a regime allowing only the former type of suit is a more than adequate remedy

The Government's brief observes what is patently

obvious: the railroad could provide a warning in the workplace to the workers regarding the dangers of using products with asbestos. U.S. Br. 27. It is absurd to say that the employer – who Congress recognized is in the best position to provide safety for their employee, shifting the burden of damages to the railroad – was less well-positioned than distant, off-site manufacturers to provide warnings.

Indeed, "[i]n the workplace setting, the product manufacturer often cannot communicate the necessary safety information to product users in a manner that will result in reduction of risk. Only the employer is in a position to ensure workplace safety by training, supervision and use of proper safety equipment." Victor E. Schwartz, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. Cin. L. Rev. 38, 43 (1983). Because the employer is on the scene and knows how their own shop is run, they are "often more knowledgeable than the manufacturer about the particular use to which the product is being put." *Id.*

The employer, in other words, is in the best position to provide for their worker - as the Congress recognized when creating an exclusive remedy under FELA for railroad workers. *See also* Victor E. Schwartz, *Effective Communication of Warnings in the Workplace: Avoiding Injuries in Working with Industrial Materials*, 73 Mo. L. Rev. 1, 13 (2008) ("Product liability law seeks to place liability with the entity in the best position to prevent the harm, and, in the workplace, the sender in the best position to effectively communicate a warning that prevents harm is the direct employer.")

Doctors and railroad workers knew as early as the 1920's – before Mr. Corson began working for the railroad – that asbestos caused cancer or was posing a danger to workers. Barry I. Castleman, *Asbestos: Medical and Legal Aspects* 1, 6-10 (4th ed. 1996). In 1935 - before Mr. Corson began working - an industry meeting of the Association of American Railroads concluded that because dust posed a health risk, railroads should "have frequent analyses made of the dust content of the air at different times during the work hours." *Proceedings of the Fifteenth Annual Meeting of the Medical and Surgical Section* 90 (Association of American Railroads, Atlantic City, NJ 1935), *cited by Sanders v. CSX Transp.*, 2000 U.S. Dist. LEXIS 22707, *20 (S. Dist. of Geo. 2000). There were other AAR reports from 1932, 1933, 1937, 1939, 1940, 1941, 1951, 1952, 1953, 1957, and 1958 showing it is well-established that industry knew that the threat from asbestos was real and had been counseled by experts on safety measures that should be taken. *Fulmore v. CSX Transp., Inc.*, 252 Ga. App. 884, 897, 557 S.E.. 2d 64, 75 (2001) (overruled by *Ayers*, 538 U.S. 135 (2003) on unrelated grounds). This Court has even held that the railroad industry can be liable in damages under FELA for using asbestos, specifically for emotional distress damages. *Ayers*, 538 U.S. at 157. There is no reason to believe that manufacturers were in any better position than railroads to prevent harm from asbestos.

2. FELA's "slightest negligence" standard means that railroads will almost always be liable for workplace injuries suffered by railroad workers, while workers will

have a more difficult time prevailing against a manufacturer

In the specific context of railroads, the Court has affirmed the common law "broad proposition that a railroad has the nondelegable duty to provide its employees with a safe place to work..." *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 7 (1964). "A railroad has a duty to use reasonable care in furnishing its employees with a safe place to work. That duty was recognized at common law [and] is given force through the Federal Employers' Liability Act..." *Atchison, T. & S., F.R. Co. v. Buell*, 480 U.S. 557, 558 (1997). If a manufacturer's failure to provide a warning in a place under the complete control of the employer caused an injury to the worker, then how did a railroad not engage in the slightest negligence by not providing a safe place to work?

Without the railroad's knowledge or permission, the manufacturer could not have "post[ed] warnings in repair shops themselves." *Id.* To insist that a railroad may not be negligent for failing to train or warn its employees under FELA's slightest negligence standard - the "vanishing point" as Dean Prosser put it - but the manufacturer's warning on a box or part would have protected workers is inaccurate. A cause of action under FELA against the railroad is more than adequate in light of the far more difficult standards of proof under state common law against manufacturers, who also would be able to raise defenses not available under FELA.

E. LIA Preemption Would Not Leave Those

Other Than Railroad Employees Without an "Effective Remedy"

1. The Court does not need to decide whether non-employees' tort claims are preempted, but many such workers would have an adequate remedy under workers' compensation

The Court simply does not need to decide the full extent of LIA preemption outside the context of railroad employees because this case is brought solely on behalf of an injured railroad worker. Even still, the vast majority of workers outside of the railroad industry are covered by workers' compensation, and there is no indication that the LIA was intended to preempt workers' compensation claims for such non-employees. For all such workers, including workers employed by independent contractors doing work on a railroad, there is no reason to believe that Congress would have deemed the workers' compensation remedy not to be an "effective remedy," especially given that it is considered to be an effective remedy for other types of workers.

FELA is presumed to provide adequate protection for railroad workers such that states have excluded railroad workers from their own workers' compensation laws. *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991). In *Hilton*, the Court was concerned that in the absence of a remedy such as FELA, an injured worker who worked for a state-owned railroad would be unable to recover anything because workers' compensation did not apply. *Id.* at 202. States

had excluded railroad workers from such claims because FELA was considered adequate for them. *Id.* But conversely, if workers' compensation had applied to railroad workers, the Court may not have seen the necessity in expanding FELA's coverage to state-owned railroad workers, as it too would have been considered an adequate remedy for them, as it is for the rest of the labor force. Workers' compensation for non-employees would be adequate.

2. Railroads may privately contract for contribution in their purchase contracts with product manufacturers

If railroads themselves are held liable under FELA and wish to retain the right to sue product manufacturers for contribution, there is no reason that they cannot do so by including a contribution or indemnity provision in their purchase contracts. The LIA preempts state "regulation" of locomotives, but a state does not engage in regulation when it simply permits private contracting parties to sue under state contract law to enforce a mutually-agreed-upon contribution provision.

Railroads are in privity of contract with manufacturers and thus are in a position to protect themselves by entering into contracts that provide them with a right of contribution. Contractual common law claims are not "state regulation" of locomotives. To the extent that the LIA preempts state tort claims, no assertion is made by any party that it preempts private contractual claims between the railroad and

manufacturers. For instance, they could sue for breach of warranty, whether an express warranty made or implied warranties of merchantability or fitness for a particular purpose. These are remedies commonly found in all state commercial codes, modeled after the Uniform Commercial Code's Article 2.

While FELA prohibits employer-employee contracts for indemnity, it does not prohibit other such contracts. *See* 45 U.S.C. § 55. The right to contract for contribution or indemnity can be found in quasi-contract for unjust enrichment or, more applicable here, as a contractual right. Andrew Kull, *The Source of Liability in Indemnity and Contribution*, 36 Loy. L.A. Rev. 927, 927 (2003) ("Except when it is based on a contract, express or implied-in-fact, liability for indemnity or contribution is usually described as a species of restitution based on unjust enrichment.").

No party has suggested that "state regulation" of locomotive safety – specifically state tort suits under the question presented – includes private contractual agreements or state statutory remedies. The railroads have an adequate means of protecting themselves after an adverse FELA decision, if they so choose.

II. THE FEDERAL RAILROAD SAFETY ACT DID NOT CHANGE THE PREEMPTIVE EFFECT OF THE LOCOMOTIVE INSPECTION ACT AS DECIDED BY THIS COURT IN *NAPIER*

Petitioners urge this Court to hold that *Napier* should be read in such a way that would permit state

tort suits despite the clear command of the Court that, through the LIA, "Congress has... occupied the entire field" of locomotive safety and that it did not "intend that there might still be state regulation of locomotives." *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926). While assertions of policy reasons and general historical changes in preemption doctrine are well-intentioned, they cannot be used to meet the heavy burden of reversing the Court's prior statutory construction decisions or the weight of consistent application of that construction by nearly every court that has addressed it.

Moreover, the Court should not be persuaded by the claim that the Federal Railroad Safety Act intended to change the relationship between state and federal regulation of locomotives. Contrary to the reading of the legislative history by *amici*, the Congress never intended the FRSA to change anything in the law relating to the Locomotive Inspection Act, and even later recodified the law without substantive change, including the key provision of the LIA at issue in this case.

The legislative history and intent of the FRSA, if anything, reaffirmed the holding in *Napier* and the broad field preemption of locomotive safety regulations for which it stands. Congress has had eighty-five years to alter the decision through legislation, yet time and again they have chosen to move lever in favor of a national regulation of the railroad industry. This leaves no room for state tort suits relating to locomotive safety in light of *Napier* and the actions of Congress.

A. The Principles of *Stare Decisis* Should Guide the Court in Rejecting a Challenge to a Decision That Is 85 Years Old

In 1926, this Court handed down a broad field preemption decision in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926). For eighty-five-years, this decision has stood the test of time. It has been cited by the Court as precedent numerous times for a variety of reasons throughout those many years. Yet Petitioners seek to have this Court narrow that precedent in a way that contradicts more than three-quarters of a century of understanding of the federal government's broad powers over locomotive safety. Given the principles of *stare decisis*, overruling or altering *Napier* for policy reasons is not tenable.

The doctrine of *stare decisis* is "of fundamental importance to the rule of law." *Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 494 (1987). Unlike questions of constitutional law, decisions relating to construction of a statute are to be given much greater deference because "the legislative power is implicated." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). The party seeking to overturn a prior decision of statutory construction bears "the heavy burden of persuading the Court that changes in society or in the law dictate" an overruling of the precedent. *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). This is the wise policy because, regardless of the soundness of the rule of law, "it is more important that the applicable rule of law be settled than that it be settled right," even when it is a "matter of serious concern, provided that a correction can be had by legislation." *Burnet v.*

Coronado Oil & Gas Co., 285 U.S. 393 , 406-07 (1932) (Brandeis, J., dissenting).

Petitioners have simply not met that "heavy burden" of showing that Napier should be overruled or looked upon in a different light. With the exception of the Pennsylvania Supreme Court, not a single federal court of appeals or state supreme court has held that the LIA does not preempt state tort suits. *See Norfolk & Western Ry. Co. V. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980). Even that decision was impliedly overruled by a summary affirmance of a lower district court decision holding that *Norfolk & Western* was incorrect in light of *Napier*. *Consolidated Rail Corp. V. Pa. Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983). At least six federal courts of appeals and five state courts of last resort have held, consistently, that the LIA preempts state tort suits. RFPC Reply Br. to Pet. 9. To say that the law of the LIA's field preemption has changed or been called into question by anyone other than one state court is incorrect.

Given the Court's own reliance on *Napier* and its broad preemptive effect,[2] revisiting the question would be inconsistent with concepts of the rule of law, which require "continuity over time" such that "a respect for precedent is, by definition, indispensable." *Planned*

---

[2] *See, e.g., Southern Ry. Co. v. Lunsford*, 297 U.S. 298, 402 (1936); *California v. Taylor*, 353 U.S. 553, 560 n.8 (1957); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 772 (1947); *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 10 (1950); *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 157 (1978).

Parenthood v. Casey, 505 U.S. 833, 854 (1992). Moreover, given the possible reliance interests that manufacturers of locomotives and their parts have in releasing one product for the entire nation based on uniform standards, overturning eighty-five years of precedent and consistent decisions would have the effect of subjecting these manufacturers to many more state tort suits for a variety of claims simply because the Secretary of Transportation has not issued a specific regulation in that area relating to locomotive safety. If the Petitioners are correct, then future state tort suits will be permissible against manufacturers who designed, manufactured, or sold products that are used in locomotives under the assumption that it was the federal government, not state juries, that determined the safety of locomotive parts.

Opening up these manufacturers to such suits when every federal court of appeals and nearly every state court has said that such claims are preempted would violate one of the principles of *stare decisis*. *Id.* One of the questions involved in stare decisis analysis is "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." *Id. See also United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 48 (1924) (discussing the effect of overruling rules relating to statutory construction having a retrospective effect compared to legislatures changing the law only for the future). As the Court noted in one of its early *stare decisis* opinions:

> Judicial decisions affecting the business interests of the country should not be disturbed except for

> the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed. If there should be a change, the legislature can make it with infinitely less derangement of those interests than would follow a new ruling of the court, for statutory regulations would operate only in the future.

National Bank v. Whitney 103 U.S. 99, 102 (1881). There is little reason for the Court to overturn its precedent on the basis of a new and novel interpretation of the LIA or on the basis of policy rationales. *Stare decisis* and respect for consistency in the rule of law are too important to so easily toss aside the overwhelming weight of authority by this Court and others. If a change is to be made, it should come from the Congress.

B. The FRSA Did Not Alter The Preemptive Effect of the Locomotive Inspection Act as Decided in *Napier*

The Petitioners make several arguments for why *Napier* is no longer good law, but WLF will only focus on one of these arguments. Namely, the idea that the passage of the Federal Railroad Safety Act of 1970 altered the preemptive scope of the Locomotive Inspection Act is simply untrue and a poor reading of the legislative history. In fact, the FRSA only further shows the Congress' commitment to the LIA as existing and consistent federal regulation of locomotive safety.

While the Court and the Congress have trended in favor of conflict preemption over the last few decades, there is no need to assume that field preemption is not applicable, especially when prior decisions of the Court have held that a statute does, in fact, preempt a field. The FRSA did not change the preemptive effects of the LIA, contrary to what certain *amici* have contended; the FRSA was enacted to maintain existing law and expand the regulation of the railroad in order to create national uniformity of the laws. Existing law that preempted state regulation of the railroads was deemed to be sufficient, and the FRSA was viewed as only supplementing that existing regulation with additional federal action in other areas or state regulation in its absence. The so-called "savings clause" of the FRSA is at issue:

> A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary...prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C. § 20106. What the savings clause does not mention, but the legislative history does, is that the savings clause applies to future areas of rail safety, not those that had already been regulated.

One brief contends that the legislative history implies that the FRSA was intended to supplement existing law by allowing more room for state regulation of the railroad *at the expense of existing federal law*. *See* NARVE Br. 15. This is a misreading of the legislative history. The text from the committee report

directly contradicts this claim. As the committee stated, the LIA and existing federal law had "served well" and would be "continued without change." H. Rep. No. 91-1194, 1970 U.S.C.C.A.N. at 4105.

Continuing the law without change would have, at the time, meant that Congress was not only aware of the broad field preemption over locomotive safety, but also considered it to be acceptable. After all, it had served the nation well. The legislative history and the text of the statute itself indicate that the goal of the FRSA was to create an even broader, national comprehensive regulatory scheme while preserving a role for state participation *where the federal government had not already regulated.* Ever since the passage of the LIA and the decision in *Napier*, the federal government had regulated the field of locomotive safety. *See* Viad Supp. Br. 19, n.7. The FRSA did not change this.

Given that the legislative history indicates that the LIA would continue unchanged and a further statement from the committee as to what existing law holds, ("[a]t the present time where the federal government has authority, with respect to rail safety, it preempts the field"), it is certain that the Congress did not intend the law to change as it was currently formulated: where the government had been granted authority, it preempted the field. *Amici* for Petitioners read this portion of the legislative history as though Congress intended to take away field preemption from the LIA and change it into conflict preemption, in all areas of federal railroad safety. But this is not so. It is a poor reading of the legislative history and ignores the simple, logical nature of the FRSA itself, which intended

to expand federal regulation of the railroad industry, not contract it.

Noting a distinction between "federal authority" and "federal action" actually proves that the Congress did not intend to change anything as to existing law. NARVE Br. 16. Where there was current federal authority, the law would continue to preempt state regulation. Where there was *not* an existing grant of federal *authority* through existing federal law – which had served well and would continue unchanged – then federal *action* would conflict preempt state action. The FRSA cannot be read to have taken the field preemption of the LIA, a law that was to continue unchanged, and turned it into conflict preemption. Only future, currently unregulated areas of rail safety would be analyzed under the conflict preemption regime. The goal was to "promote safety in every area of railroad operations," 49 U.S.C. § 20101, with a mixture of current and future federal regulation and with "provisions for state participation to assure a much higher degree of railroad safety in the years ahead." H. Rep. No. 91-1194, 1970 U.S.C.C.A.N. at 4105. Examples of such state participation would be regulation in areas where the government had not already regulated, and namely, the provision of the act entitled "State participation" relating to investigative and surveillance activities. 49 U.S.C. § 20105.

Additionally, Petitioners themselves acknowledge that there were specific laws, such as the LIA, that permitted the federal government to regulate in an area prior to 1970, before the FRSA was enacted. Pet. Br. 7-8. These laws had limited oversight in certain areas,

such as locomotives, but they nonetheless granted broad authority to the federal government in those areas. The FRSA did not change the scope of those laws, including the LIA. As the Ninth Circuit found in *Marshall v. Burlington N., Inc.*, "the language and structure of the [FRSA] indicate a congressional intent to leave the [LIA] intact, including its preemptive effect." 720 F.2d 1149, 1153 (9th Cir. 1983). As then-Judge Kennedy wrote, "[t]he logical inference from this structure is that Congress intended to leave unchanged the force and effect of existing federal regulatory statutes." *Id.*

While the Government disagrees with Respondents regarding the scope of the LIA's preemption with respect to certain tort claims, the Government does agree that *Napier* field preemption encompasses some tort claims. U.S. Br. 12. The Government also agrees that when Congress adopted the FRSA, it did not intend to change federal law with respect to locomotive safety. Noting that the operative language of the FRSA "expressly states that it "supplement[s]" existing laws and regulations, instead of replacing or modifying them," the Government correctly argues that the "legislative history confirms that Congress did not intend the FRSA to alter the preemptive effect of existing federal safety statutes." Br. for the United States as *Amicus Curiae* at 19-20, *John Crane Inc., v. Atwell*, No. 10-272 (U.S. filed May 6, 2011). The brief also cites legislative history that the Petitioners and *amici* do not: the House report expressed the intent "that the existing statutes continue to be administered and enforced as if this legislation had not been enacted." HR Rep. No. 1194, 91st Cong., 2d Sess. 8 (1970).

The FRSA was recodified in 1994, eliminating certain portions of the LIA that were no longer needed, while retaining the basic provision on lomocotive safety that was at issue in *Napier* and in this case. 49 U.S.C. § 20701. Contrary to what the brief for NARVE argues, these recodifications were not intended to change existing law or the preemptive effect of the LIA's remaining provisions. NARVE Br. 22. In fact, they state earlier on in their brief that the purpose of the recodification was to simply restate the laws "in comprehensive form" and to do so "without substantive change." NARVE Br. 5, (*quoting* S. Rep. No. 103-265, 1).

Allowing states to regulate in an area where they could not regulate prior to the 1970 enactment of the FRSA, such as the design and manufacture of locomotives and their safety, would not serve the express purpose of the FRSA to provide a uniform, national system. 49 U.S.C. § 20106(a) ("Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable."). As the legislative history indicates, the "savings clause" was not intended to displace the broad field preemption of existing federal law, such as the LIA.

With the Congress finding that laws such as the LIA had served well and would not change, it is impossible to argue that any "savings clause" saved something that had not even existed as a realm for state regulation. The savings clause clearly applies to additional areas of rail safety that had not already been regulated prior to 1970 and were not subsequently

regulated through future federal action. The Congress did not intend to eliminate field preemption of existing federal law *sub silentio*, especially given protestations from those who enacted the law otherwise.

CONCLUSION

Amicus curiae Washington Legal Foundation requests that the Court affirm the the judgment below.

Respectfully submitted,

Daniel J. Popeo
Michael P. Wilt
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: October 7, 2011